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**Law, Anthropology, and
the Constitution of the Social**
Making Persons and Things

ALAIN POTTAGE AND MARTHA MUNDY

CAMBRIDGE STUDIES IN LAW AND SOCIETY

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LAW, ANTHROPOLOGY, AND THE CONSTITUTION OF THE SOCIAL

This collection of interdisciplinary essays explores how persons and things – the central elements of the social – are fabricated by legal rituals and institutions. The contributors, legal and anthropological theorists alike, focus on a set of specific institutional and ethnographic contexts, and some unexpected and thought-provoking analogies emerge from this intellectual encounter between law and anthropology. For example, contemporary anxieties about the legal status of the biotechnological body seem to resonate with the questions addressed by ancient Roman law in its treatment of dead bodies. The analogy between copyright and the transmission of intangible designs in Melanesia suddenly makes Western images of authorship seem quite unfamiliar. A comparison between law and laboratory science presents the production of legal artefacts in a new light. These studies are of particular relevance at a time when law, faced with the inventiveness of biotechnology, finds it increasingly difficult to draw the line between persons and things.

ALAIN POTTAGE is Reader in Law at the London School of Economics and Political Science. Previously he has taught in the law schools of King's College, London, and Sydney University. He has published extensively on questions of property law and legal theory.

MARTHA MUNDY is Reader in Anthropology at the London School of Economics and Political Science. She has published an ethnography, *Domestic Government: Kinship, Community and Polity in North Yemen* (1995), and edited several books, most recently, *The Transformation of Nomadic Society in the Arab East* (co-edited with B. Musallam, Cambridge, 2000) and *Law and Anthropology* (2002).

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Making Persons and Things

Edited by

Alain Pottage and Martha Mundy

London School of Economics and Political Science



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CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press

The Edinburgh Building, Cambridge CB2 2RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org

Information on this title: www.cambridge.org/9780521831789

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First published in print format 2004

ISBN-13 978-0-511-21072-3 eBook (EBL)

ISBN-10 0-511-21249-6 eBook (EBL)

ISBN-13 978-0-521-83178-9 hardback

ISBN-10 0-521-83178-4 hardback

ISBN-13 978-0-521-53945-6 paperback

ISBN-10 0-521-53945-5 paperback

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CONTRIBUTORS

Engin Akarlı is the Joukowsky Family Distinguished Professor of Modern Middle East History at Brown University. He has taught at several universities, serves on the editorial board of *Islamic Law and Society*, and is the author of several publications including *Political Participation in Turkey* (1974), *Belgelerle Tanzimat* (1977), and *The Long Peace: Ottoman Lebanon, 1861–1920* (1993).

Susanne K  chler is Reader in Material Culture Studies in the Department of Anthropology, University College London. She has written on images of memory and the art of forgetting with special reference to the Pacific. Currently she is directing an ESRC funded project entitled ‘Clothing the Pacific’, linking University College London, the British Museum, and Goldsmiths College.

Bruno Latour is Professor in the Centre of Innovation at the   cole Normale Sup  rieure des Mines in Paris. He also holds appointments at the London School of Economics and in the Department of the History of Science at Harvard University. He is the author of many books, most of which have been translated into English, notably *We Have Never Been Modern* (1993), *Aramis or the Love of Technology* (1996), and *Pandora’s Hope* (1999).

Martha Mundy is Reader in Anthropology at the London School of Economics. Earlier she taught at Yarmouk University in Jordan, Universit   Lyon 2 Lum  re, UCLA, and the American University of Beirut. Together with Richard Saumarez Smith, she is completing a monograph on *The State of Property: Law, Administration and Production in Late Ottoman Southern Syria*.

Tim Murphy is Professor of Law at the London School of Economics. His publications include (with Simon Roberts) *Understanding Property Law* (3rd edn, 1998) and *The Oldest Social Science? Configurations of Law and Modernity* (1997). His current research is in the field of law and social theory and the history and theory of heritage.

Alain Pottage is Reader in Law at the London School of Economics. He has written on various aspects of law and social theory, with

particular reference to questions of ownership, and is currently preparing a book on biotechnology patents.

Marilyn Strathern is William Wyse Professor of Social Anthropology at the University of Cambridge. She is the author of a number of books, including *The Gender of the Gift* (1988), *After Nature* (1992), and *Property, Substance and Effect* (1999).

Yan Thomas is Chair of the Centre d'Étude des Normes Juridiques at the École des Hautes Etudes en Sciences Sociales in Paris. He is the author of several articles on Roman legal culture and legal history, as well as a number of books including *'Origine' et 'Commune Patrie': étude de droit public romain* (1996), and two forthcoming works on, respectively, legal history and the institution of paternity.

CHAPTER ONE

INTRODUCTION: THE FABRICATION OF PERSONS AND THINGS

Alain Pottage

Each of the contributions to this book addresses the question of how legal techniques fabricate persons and things. In exploring that question, and in asking just what ‘fabrication’ means, each chapter focuses on a specific historical, social, or ethnographic context. Given that these contexts, and the modes of institutional or ritual action which they disclose, are quite varied, this book does not aim to provide a general theoretical account of the fabrication of persons and things in law. Indeed, the term ‘fabrication’ is chosen precisely because it suggests modes of action which are lodged in rich, culturally-specific, layers of texts, practices, instruments, technical devices, aesthetic forms, stylised gestures, semantic artefacts, and bodily dispositions. Each contribution shows how, in a given social, historical, or ethnographic context, elements of this repertoire are mobilised by legal techniques of personification and reification. The specific character of these modes of action would be lost in a general theory of law as an agent of ‘social construction’. Yet, diverse as they may be, our approaches to the question of legal fabrication are brought together as resources for reflection upon a specific institutional predicament. In Western legal systems, persons and things are now problems rather than presuppositions. One could point to technology, and biotechnology in particular, as the main factor here, but there are other reasons for the implosion of the old legal division between persons and things. For example, those institutions which effectively ‘naturalised’ legal artefacts (notably, the institution of inheritance) have lost their central role in law and society. For the purposes of an introduction, the important point is that the complex

techniques which legal institutions traditionally used to fabricate persons and things no longer function silently and reliably. The legal boundary between persons and things, rather like that between nature and culture, is no longer self-evident. In many areas, legal forms have been colonised by 'ethical' (or similarly regulatory) modes of decision-making, which implicitly acknowledge the impossibility of beginning within a natural order of things. Collectively, the contributions to this volume give historical and comparative depth to reflection on this predicament.

The question of how legal institutions construct the category of the person has been asked often before. For example, a great deal of attention has been given to the statuses which Western legal systems attributed (or denied) to married women. Many of these studies imagine legal personality as the institutional clothing of a 'real' (natural, biological, or social) person; and, however critical they might be in other respects, the distinction between persons and things continues to function as an untheorised premise, much as it does in orthodox legal doctrine and theory. In some cases, what is in question is only the proper attribution of phenomena to either side of an ostensibly natural division between persons and things. Elsewhere, an immanent critique of legal constructs is underpinned by the untheorised assumption that legal rules *correspond* to natural or social facts.¹ Of course, there are studies of the legal status of women which develop sophisticated analyses of legal categories as ideological constructs.² But even where the legal person is analysed in these terms, the division between persons and things remains a silent premise; it resurfaces as a methodological commitment to a distinction between construction and reality; or, in Marxist terms, between science and ideology.³ The contributions to this book approach the question of fabrication without assuming a division between persons and things, either as a basic truth about the nature of phenomena they observe, or as a methodological postulate

¹ As in M. Davies and N. Naffine, *Are Persons Property?* (Dartmouth, Ashgate, 2001). See, e.g., at p. 99: 'possessive individualism in law, though still robust in contemporary legal thinking, fails to supply a sensible, credible understanding of our embodied selves'; and, on the same page, possessive individualism is said to 'deal poorly with the facts of female embodiment'.

² See notably Mary Poovey, *Uneven Developments: The Ideological Work of Gender in Mid-Victorian England* (Virago, London, 1989).

³ See, e.g., the observations on social constructivism that are made in Bruno Latour, Chapter 3.

which structures observation itself. The distinction between persons and things may be a keystone of the semantic architecture of Western law, but our accounts of fabrication distinguish between the semantic and pragmatic dimensions of law. From that perspective, the distinction becomes a contingent form, which is sustained by modes of social action which are productively misunderstood⁴ by legal semantics.

The distinction between persons is interesting not because there is some critical discrepancy between the legal construction of the person and the natural reality of human individuality, but because it is becoming clear that the *act of distinguishing* between these two orders is itself radically contingent. In other words, the question now is not how to fit entities into the 'right' category, but to explore the emergence and deployment of the category itself. It is becoming increasingly clear that in Western legal systems, as elsewhere, 'the order of things is determined by decision, a distinction, that itself is not ordered'.⁵ So, whereas critiques of law have so far treated the category of person/thing as an embedded feature of the world (either in the sense that it mirrors the ontological structure of the world, or in the sense that it defines the terms in which we apprehend the world), the approach taken in this volume treats it as a purely semantic, aesthetic, or ritual form, which is produced by particular perspectives or techniques. The distinction 'is not itself ordered' because it is referable to these emergent ways of seeing and doing rather than to the ontological architecture of the world. Not all of the contributors to this volume share the vocabulary of divisions and distinctions (which is drawn from systems theory) or the theoretical approach which it expresses, but all are concerned to apprehend legal and social action without presupposing a categorical division between persons and things. More importantly, perhaps, all of the contributions drop the theoretical prejudice built into the old category, which, at least in the case of law, took the person as the privileged term. Whereas traditional accounts of law were concerned only with the question of how persons were constructed ('things' being the implicit antithesis of 'persons') our inquiry is symmetrical, being as much concerned with the fabrication of things as of persons.

⁴ For this idea of 'productive misunderstanding', see, e.g., Gunther Teubner, 'Contracting Worlds: The Many Autonomies of Private Law' (2000) 9(3) *Social and Legal Studies* 399.

⁵ William Rasch, 'Introduction' to Niklas Luhmann, *Theories of Distinction: Redescribing the Descriptions of Modernity* (Stanford University Press, Stanford, 2002), p. 24.

RES AND PERSONA

The distinction between persons and things has always been central to legal institutions and procedures. The institutions of Roman law, to the extent that Rome can be taken as the origin of the Western legal tradition, attached persons (*personae*) to things (*res*) by means of a set of legal forms and transactions (*actiones*) which prescribed all of their permissible combinations.⁶ In the common law tradition, this sort of division is not as precisely drawn as it is in European codified systems, but the continuing importance of Hohfeld in Anglo-American legal theory testifies to the fact that the common law also assumes this fundamental division.⁷ It may even be that, having been constructed and refined in Roman legal institutions, the basic division was taken up in other branches of social theory. There is a very powerful argument that the institutional architecture of Roman law still structures our apprehension of society, and that sociology and political theory are more profoundly 'juridical' than they imagine themselves to be, precisely because they presuppose a basic division between persons and things.⁸ Whether or not one subscribes to that argument, it reminds us that the distinction between persons and things is a foundational theme in Western society, and that legal institutions have played an essential role in constituting and maintaining that distinction. Confidence in what Bruno Latour calls the 'old settlement' is no longer as straightforward as it might seem. With the advent of biotechnology patents, biomedical interventions, transgenic crops, and new environmental sensitivities, the distinction between persons and things has become a focus of general social anxiety. In each of these technological areas, persons become indistinguishable from things: gene sequences are at once part of the genetic programme of the person and chemical templates from which drugs are manufactured; embryos are related to their parents by means of the commodifying forms of contract and property, and yet they are *also* persons; depending on the uses to which they are put, the cells of embryos produced by *in vitro* fertilisation might be seen as having either

⁶ See W. T. Murphy, *The Oldest Social Science* (Oxford University Press, Oxford, 1997), ch. 1.

⁷ The classic texts are W.N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 26 *Yale Law Journal* 16; 'Some Fundamental Conceptions as Applied in Judicial Reasoning' (1917) 26 *Yale Law Journal* 710.

⁸ The most sophisticated argument is found in Gillian Rose, *Dialectic of Nihilism* (Basil Blackwell, Oxford, 1984).

the 'natural' developmental potential of the human person or the technical 'pluripotentiality' that makes them such a valuable resource for research into gene therapies. In each of these cases, the categorisation of an entity as a person or a thing is dependent upon a contingent distinction rather than an embedded division.

Accordingly to popular perception, legal institutions are supposed to be based on a natural division between persons and things, and yet now they seem systematically to transgress that natural ordering. For example, intellectual property laws reinforce the grip of pharmaceuticals corporations on human tissues, family law tolerates or endorses the commodification of gametes and embryos, and bio-ethical legislation allows various kinds of therapeutic research on (human) embryos. Attention is (again) directed to the question of how to distinguish persons from things, and it is often argued that new developments imply a fundamental departure from the 'original' legal constitution of the two categories. In these circumstances it seems especially appropriate to (re-)consider the making of persons and things in legal settings. Whatever one makes of the idea that we still have to reckon with the legacy of Roman law,⁹ contemporary critiques of technology implicitly appeal to some notion of a tradition conserved by law. It is therefore quite timely to explore the fabrication of persons and things from a historical-anthropological perspective, by paying attention to the different contexts in which these legal categories have been deployed, and by extending the inquiry beyond Western institutions. The contributions to this book suggest that persons and things have multiple genealogies, and that their uses are too varied to be reduced to one single institutional architecture. Each form or transaction constitutes persons/things in its own way. This has some important implications. Although the theme of slavery still informs critiques of contemporary technology (it is often asked, for example, how the 'ownership' of genes or embryos is different from the ownership of slaves) the real problem is that we can no longer divide the world into the two registers that are presupposed by any argument against slavery. Now, the problem is that humans are *neither* person *nor* thing, or simultaneously person *and* thing, so that law quite literally *makes* the difference.¹⁰ This book develops a

⁹ This is the perspective adopted by the legal anthropology of Pierre Legendre, which is presented in his *De la société comme texte* (Fayard, Paris, 2002).

¹⁰ There is a resonance between emergent social anxieties and the recent questioning of the distinction between persons and things in science studies (e.g., Bruno Latour, *Politiques de la nature* (La Découverte, Paris, 1999), esp. chs. 1 and 2).

number of perspectives on the kind of 'in-between' action which produces legal form, and especially persons and things: network action and circulating reference, institutional fictions, indexes of attachment, the manipulation of semantic potential, and so on. And this is precisely where ethnographic observation complements legal-theoretical analysis. Although not all of the essays are about Western law, and although one or two have little to say about legal institutions as such, each offers a resource for re-thinking the composition of persons and things, the modes in which they are distinguished and (re-)combined by legal institutions.

One particular sub-institution – ownership – is central to the treatment of personification and reification. To some extent this may be inevitable, because ownership is so often taken to be the keystone of legal and social institutions. Certainly, ownership is the context in which legal doctrine and legal theory have worked out the capacities or competences of persons *in relation* to things, and ownership is the thematic 'channel' through which these doctrinal glosses have made their way into general circulation in society. Ownership is the setting in which the legal constitution of persons and things has become most vulnerable to social and technological developments. Through the use of biomedical technologies, human beings have acquired potentialities which are actualised in a new set of claims and attachments. Law, and property law in particular, is asked to construe 'claims for which no prior transactional idiom [exists]'.¹¹ This is not just a variation on the old argument that law lags behind society (in any case, we should now conceive of law *in* society rather than law *and* society).¹² Western law (or, more precisely, adjudication) has always taken shape 'between' convention and invention; the paradox arises from the manner in which legal procedures invent the tradition which they purport only to continue.¹³ The trouble with biomedicine and biotechnology is that they expose the paradox for what it is, and a number of our contributors identify reasons why Western law is finding it increasingly difficult to manage contingency in the 'traditional' ways. The tension between tradition

¹¹ Marilyn Strathern, 'Potential Property: Intellectual Rights and Property in Persons' (1996) 4 *Social Anthropology* 1, 17–32, at p. 18.

¹² See generally Niklas Luhmann, *Das Recht der Gesellschaft* (Suhrkamp, Frankfurt, 1995).

¹³ There is a wonderful illustration of this in F.W. Maitland, 'Why the History of English law is Not Written' in H.A.L. Fisher (ed.), *The Collected Papers of Frederic William Maitland* (Cambridge University Press, Cambridge, 1911).

and modernity, as it affects the central contexts of legal personification and reification (kinship, ownership, production), is an important theme in contemporary anthropology. And, even though it is not explicitly addressed by all of our contributors, it is an essential theme in the collection as a whole; for example, Yan Thomas' analysis of the Roman law relating to dead bodies is written against the backdrop of developments in contemporary law relating to the legal status of the body and its tissues.

This is just one sense in which our reflection on personification and reification in law brings together law *and* anthropology.¹⁴ The questions raised by biotechnology and biomedicine are compounded by the effects of 'globalisation'. To begin with, the extension of corporate and institutional networks re-contextualises cultural forms; the point is not that the world is becoming progressively more uniform,¹⁵ but that globalisation brings with it new sensitivities to the distinction between local and global. This is an anthropological question: 'whether one lives in Papua New Guinea or in Britain, cultural categories are being dissolved and re-formed at a tempo that calls for reflection, and that, I would add, calls for the kind of lateral reflection afforded by ethnographic insight'.¹⁶ But these sensitivities have important implications for the (self-)conceptualisation of law. The expansion of legal discourses beyond their national limits elicits new conceptions of the agency or fabrication of law.¹⁷ How should law be identified if the old emblems of state power are no longer available? One response is given in Gunther Teubner's interpretation of global law in terms of autopoietic theory, which develops the old anthropological theme of legal pluralism into the model of a legal discourse that sustains itself without reference to a local, national, authority.¹⁸ Legal action is re-defined. In place of hierarchy, sovereignty, and domination, law is construed as a discourse that consists only in actualisation (its use in communication) rather than

¹⁴ The complexities of this mediating 'and' cannot be discussed extensively here. See, Annelise Riles, 'Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity' (1994) 3 *University of Illinois Law Review* 597.

¹⁵ A recent issue of the French legal journal *Archives de la Philosophie du Droit* was entitled 'L'américanisation du droit'.

¹⁶ See Marilyn Strathern, *Property, Substance and Effect* (Athlone, London, 1999), p. 24.

¹⁷ On this theme see generally A. Riles, *The Network Inside Out* (Michigan University Press, Ann Arbor, 1999).

¹⁸ G. Teubner (ed.), *Global Law Without a State* (Dartmouth, Aldershot, 1997).

in substance (a corpus of texts or an institution of domination). Again, the implications of globalisation are more explicitly addressed in certain contributions, notably those by Murphy, Strathern, and Küchler, but the new contexts of legal-cultural idioms define another of the major thematic horizons of the collection as a whole. Globalisation joins biotechnology in eliciting new conceptions of the functioning of legal institutions.

More abstractly, these essays on personification and reification are situated at a particular juncture in social theory. To borrow Niklas Luhmann's characterisation, one might say that contemporary theories of society are faced with the difficulty of changing their theoretical 'instrumentation' from a schema of 'division' to a schema of 'distinction'.¹⁹ Classically – from Aristotle to Hegel, that is – theories divided the world into foundational oppositions, which were inscribed in the very texture of the world or in the categories through which the world was (necessarily) experienced; as in, for example, the basic categories of space (near/far), time (past/future), or action (intention/effect).²⁰ Taking the example of time, the classical scheme takes the division between past and future to be embedded in the categories of experience in such a way that the present moment from which the world is observed is lodged in a succession of modal 'presents': past present, actual present, and future present.²¹ The predicament involved in transforming division-based schemes into distinction-based forms arises from the recognition that this linear scheme has become 'dis-embedded', so that the present becomes referable to a particular observer rather than a position embedded in a linear succession. In other words, the form of the distinction is contingent on the observer who draws it: 'in the case of distinction, everything depends on how the boundary that divides two sides (that is, the distinction) is drawn'.²² In the case of time, this is exemplified by the emergence of the predicament of risk, which arises

¹⁹ Niklas Luhmann, *Observations on Modernity* (Stanford University Press, Stanford, 1998), esp. ch. 4. Luhmann may be more familiar in legal theory than in anthropological theory, but see (e.g.) Sari Wastell, 'Presuming Scale, Making Diversity' (2001) 21(2) *Critique of Anthropology* 185.

²⁰ For a fuller discussion, see Luhmann, *Observations on Modernity*.

²¹ See also Jacques Derrida, *Specters of Marx* (Routledge, London, 1994).

²² Luhmann, *Observations on Modernity*, at p. 87. This is not just another form of 'relativism', if only because the distinction between relativism and objectivity loses its pertinence when theory begins from the premise of self-reference rather than correspondence.

when actors become aware that decisions made in *this* present will have consequences which will become apparent only in the *future* present that will be generated by the decision itself. In Luhmann's terms, 'time and space are only media for possible distinctions, media for possible observations, but are as unobservable as is the world as a world'.²³ The character of time as a 'dis-embedded medium' is illustrated more expressively in Marilyn Strathern's re-interpretation of the familiar legal-historical division between status (tradition) and contract (modernity). Whereas the tradition (sic) presents this division in terms of linear historical evolution, Strathern suggests that we are at 'both ends of the continuum at the same time', so that we might be said to have '*more* tradition and *more* modernity at the same time'.²⁴ A form which was constituted as the historicity of the world becomes the medium for generating a multiplicity of temporal schemata. And these modes of temporalisation bring with them modes of personification and reification. Whereas persons and things were the principal exemplars or anchors of 'divisionism' or 'asymmetry', the increasing recognition that each human body or individual is potentially either person or thing brings with it an awareness that techniques of personification and reification are constitutive rather than declaratory of the ontology upon which they are based.

This points to another thematic horizon of the collection: the question of potentiality/actuality. The proposition that legal and social conventions constitute the ontological forms which they claim only to recognise is clearly inconsistent with doctrinal and legal-philosophical understandings of social action. This has particular implications for the construal of ownership claims. The economic understanding of property is based on the notion of material scarcity; transactions in property are either concerned with extracting, processing, dividing, or transferring the finite substance of the world. In the case of intellectual property, this understanding implies that the spontaneity of mental creativity has to be materialised before it can constitute property;²⁵

²³ Luhmann, *Observations on Modernity*, at p. 87. 'Unobservable' because, as schemes which inform observation, they cannot be present to the observer in the moment of observation.

²⁴ Marilyn Strathern, 'Enabling Identity? Biology, Choice and the New Reproductive Technologies' in Stuart Hall and Paul du Gay (eds.), *Questions of Cultural Identity* (Sage, London, 1996).

²⁵ 'The law takes an intangible thing and builds around it a property structure modelled on the structure which social and legal systems have always applied to some tangible

subjectivity is only legible in material embodiments or supports. In terms of the question of potentiality/actuality, this implies that ownership conventions are coupled to a particular conception of *production* as the means by which potentialities are made actual. This conception of production attributes all creative or originating action to one or other pole of the division between persons and things. However, claims to biotechnology patents (to take one example) confront legal conventions with a kind of originating activity which does not belong to that causal scheme. As I observe in my contribution, experiments in molecular biology suggest that living organisms emerge from processes of self-production (autopoiesis or epigenesis). Far from conforming to the juridical paradigm of production, which would require the potentiality of organisms to be lodged in a genetic or evolutionary programme, these modes of self-production suggest that organisms are formed in and by the metabolic processes which sustain their processes of ontogenesis. Organic production resonates with those models of social action which have attempted to explain the paradox of emergence (namely, the paradox of self-production).²⁶ My contribution and that of Susanne Küchler sketch out some of the ways in which new conceptualisations of biological process suggest new ways of conceiving attachment, production, creation, and actualisation. Many of the essays describe legal techniques of personification and reification which, precisely because they do *not* express a more fundamental division of the world into the two registers of persons and things, suggest that law makes persons and things by actualising undifferentiated potentialities. And if nothing in this medium has an essential, ontological, vocation to be person or thing, this in turn suggests that the actualisation of potentialities is a radically creative operation.

The essays in the book describe this kind of creativity from different perspectives and with reference to different contexts or questions. The first section of the book explores the theme of institutional production. The question of institutional creativity is tracked through the

things. By instituting trespassory rules whose content restricts uses of [an] ideational entity, intellectual property law preserves to an individual or group of individuals an open-ended set of use-privileges and powers of control and transmission characteristic of ownership interests over tangible items': J.W. Harris, *Property and Justice* (Oxford University Press, Oxford, 1996), p. 44.

²⁶ In social theory the obvious example (again) is the work of Niklas Luhmann, but the question increasingly arises in the fields of accounting, management, operational systems, biology, and so on.

historical anthropology of Roman law (Thomas), through an ethnography of France's Conseil d'Etat (Latour), to an examination of the role of mass-production in law (Murphy). The second section considers how legal techniques of personification and reification actualise the potentialities contained in, respectively, semantic forms and the human body. Mundy and Akarlı analyse the construction of persons and things in Ottoman-Islamic legal settings, while Strathern, Küchler, and I develop the theme of bodily potential as a resource for the fabrication of persons and things.

PERSONS AND THINGS AS INSTITUTIONAL ARTEFACTS

If the 'making' of persons and things is approached by way of a reflection on institutional creativity, two general issues present themselves. First, the techniques by means of which the law manufactures and deploys the categories of person and thing can be seen as defining the peculiar nature of (legal-)institutional action. Following the example of Roman law, one might say that the identity of legal institutions consists in the way they build conventions and transactions round the cardinal points of person and thing. But this mode of institutional action also identifies law in the sense of distinguishing it from other social discourses or institutions. In that sense, and at least in the first instance, there is no warrant for extending the action of the persons and things invented by law beyond the horizon of the institution. Minimally, and most importantly, this means that the legal person has no necessary correspondence to social, psychological, or biological individuality. In an age which still identifies personal fulfilment or emancipation with the acquisition and defence of legal rights, this might seem almost perverse. The construction of the legal persona of the author illustrates how legal personality is taken as an attribute of 'real' individuals, and how in turn legal doctrine reinforces those expectations. For example, by constituting the author as an owner of ideas, intellectual property law stabilised and 'naturalised' the romantic conception of the spontaneously creative individual,²⁷ and this relation between legal personality and

²⁷ 'The principal institutional embodiment of the author-work relation is copyright, which not only makes possible the profitable publishing of books, but also, by endowing it with legal reality, produces and affirms the very identity of the author as author . . . What we here observe is a twin birth, the simultaneous emergence in

natural individuality still seems self-evident.²⁸ One of the advantages of anthropological distantiation is that it problematises assumptions of this sort. For example, the anthropology of Roman law reveals a mode of institutional action – or, more precisely, a technique of personification and reification – which suggests that what are taken as overarching *social* categories (the sex, gender, kinship, capacity, or creativity of persons, and the quiddity of things) are specialised artefacts which are not predicated on some general social ontology.

Institutional fictions

Yan Thomas' essay on the category of the 'pure' in Roman law proposes the most restrictive specification of legal institutions. This contribution should be set in the context of Thomas' historical anthropology of Roman law, which has been developed through a number of now celebrated studies in institutional technique. Reductively, one might say the central or fundamental question is that of institutional reference: how do legal categories relate to the world 'outside' the institution? For Thomas, the character of legal institutions is expressed by the Roman law technique of fictions.²⁹ According to the modern doctrinal understanding of proof and procedure, fictions and presumptions are devices which assist in making decisions in conditions of uncertainty. Typically, presumptions are presented as crude, pragmatic, instruments of probabilistic reasoning: as encrypted experience. For example, the old

the discourse of the law of the proprietary author and the literary work. The two concepts are bound to each other. To assert one is to imply the other, and together, like the twin suns of a binary star locked into orbit about each other, they define the centre of the modern literary system': Mark Rose, 'The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship' in Brad Sherman and Alain Strowel (eds.), *Of Authors and Origins* (Clarendon Press, Oxford, 1994), p. 23, at pp. 28 and 39.

²⁸ David Saunders summarises this point of view as follows: 'A certain habit of mind remains attached to the notion of an essential person, one which in terms of the history of authorship would typically be moral or aesthetic, the locus of a subjectivity deeper and more general than mere institutional constructs such as the juridical persons of copyright holder or obscene libeller. Unlike them, so it might seem, this subjectivity would not depend on attributes formed in a technical apparatus resting on executed statutes and judicial determinations . . . Surely there has to be a fundamental personality, the person itself, that constitutes the necessary ground of legal personalities, the anchorage on which they ultimately depend': *Authorship and Copyright* (Routledge, London, 1992), p. 12.

²⁹ Yan Thomas, 'Fictio legis: L'empire de la fiction romaine et ses limites médiévales' (1995) 21 *Droits* 17.

repertoire of presumptions used in family law to determine paternity – an example which is especially apposite because changes in the use of the old presumptions have renewed anthropological interests in legal determinations of kinship³⁰ – can be seen as attempts to second-guess biology. The probabilistic quality of presumptions becomes somewhat more tenuous in the case of something like the *commorientes* principle,³¹ and it disappears altogether where (irrebuttable) presumptions are used to impose normative objectives.³² Moreover, one might say that, precisely because fictions and presumptions are used in the absence of any determinate facts from which to draw evidential inferences, they are not really ‘evidence’ or ‘argument’.³³ But the important point is that whether they are seen as probabilistic devices or as normative trumps, their role is understood in terms of the ideal of a proper relation of correspondence between norm and nature. Fictions and presumptions work *within* the division between law and fact, or between legal propositions and the ‘things’ to which they refer.

Against this background, Thomas focuses on the technique of legal fictions in Roman law, and proposes two correctives to the modern understanding. First, there is a categorical distinction between fiction and presumptions: presumptions (even irrebuttable presumptions) are used where there is uncertainty as to the true facts; fictions are used where there is certainty as to the *falsity* of the proposition asserted by the fiction. The eclipse of this classical distinction between fictions and presumptions has obscured our view of law’s original institutional technique. Precisely because they took shape against a background negation of ‘reality’, fictions in Roman law implied something very different from the modern idea of a correspondence between norm and nature. Rather, the construction of Roman law was based on ‘a radical non-relation between the institution and the world of natural

³⁰ See, e.g., Janet L. Dolgin, *Defining the Family: Law, Technology, and Reproduction in an Uneasy Age* (New York University Press, New York, 1997).

³¹ Where two heirs die together in circumstances in which it is impossible to establish which of the two predeceased the other, the descent of property follows the ‘natural’ principle that the elder of the two died first.

³² One example is the traditional presumption of criminal law that boys under the age of 14 are incapable of rape.

³³ The upshot is that presumptions are not a mode of evidential reasoning: ‘Presumptions are not in themselves either argument or evidence, although for the time being they accomplish the result of both’: James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston, 1898), p. 336.

facts [*la radicale déliaison de l'institutionnalité d'avec le monde des choses de la nature*].³⁴ The institution had effects in the world, but these were achieved by an ongoing negation of reality. The operation of fictions in Roman law can be illustrated by reference to the technique of 'negative fictions'; these were fictions which declared that real, actual, events had not occurred (as distinct from 'positive' fictions, which declared something to exist which had no existence in 'fact'). For example, the *lex Cornelia* of 81 BC held that, despite the general rule that Roman citizens lost their testamentary capacity when they were taken captive by an enemy, citizens who died as captives were nevertheless deemed, by operation of fiction, not have been captured at all, to have died as free men, and therefore to have retained their capacity to make a valid will.³⁵ What is essential is that the law did not just fictionalise the facts so as to deny the truth of capture, but that the fiction also effected a kind of institutional 'double negation'. The role of the fiction was to countermand the prior rule as to testamentary capacity, so that the fiction negated a pre-existing law *by way of* a declaration as to the facts. In a sense one might say that the fiction articulated a relation of the institution to itself: the fiction equiparates³⁶ the institution itself to an external reality which, ostensibly, it negates. Fictions therefore performed a kind of institutional involution in which differences or distinctions were internal to the institution itself:

The difference between law and fact is not a difference of fact but one of law, and this is what defines the essence of the institution, and what makes fictions so revelatory of the artificiality of the institution.³⁷

The axis relays the institution to itself rather than to the 'real' world. So, although it might have been easier simply to validate the wills of citizens who died in captivity, without employing any kind of fiction, Roman law *preferred* fictions. With each successive involution, 'the law became increasingly isolated by these ever more complex constructions, always widening the gap between itself and reality [*le réel*]'.³⁸ By means of these concatenated negations, fictions preserved the notion of external reference, but only as a resource for an ever more involuted process of institutional self-reference.

³⁴ Thomas, 'Fictio legis', at p. 20. ³⁵ Ibid. at pp. 22–4.

³⁶ Equiparation being itself a legal technique of fictionalisation.

³⁷ Thomas, 'Fictio legis', at p. 35. ³⁸ Ibid. at p. 34.

Thomas's approach to legal institutions has some affinity with the style of legal anthropology developed by Louis Gernet.³⁹ For example, Gernet's celebrated essay on time and temporality in ancient (Greek and Roman) law demonstrates how these institutional regimes were indifferent to what would now be regarded as 'real' facts in the world. One of the examples given concerns the Roman law action of *vindicatio*, which was the formula used to claim ownership of some object. It was therefore one of the key techniques of personification and reification in Roman law, an institutional device which delimited the respective capacities and competences of person and thing. The modern interpreter might find the formula for the action of *vindicatio* entirely absurd. When he is challenged by his adversary to show cause or title ('I ask you to justify your claim [*postulo anne dicas qua ex causa vindicaveris*']'), the claimant merely refers to the ritual words with which he initiated his action ('I established my right by imposing my claim [*ius feci sicut vindictam imposui*]'). So, whereas we would expect the claimant to invoke some prior act or event as the warrant of his claim, the claimant grounds the 'substance' of the claim within the convention itself, rather than in the world of facts lying outside the institutional drama of the action. Law 'consisted in action [*le droit est essentiellement action*]'⁴⁰ because rights – and, importantly, their relation to the facts which were their warrant – had no 'ontology' other than that which was granted to them by the drama of the trial process.

Thomas emphasises the historical or anthropological specificity of the institution the better to demystify modern expectations of what law can achieve. Although there is a stronger claim – implied in the proposition that legal technique was 'the most durable and the most historically adaptable form of intelligence produced by the Roman world' – the polemical charge of his account is essentially directed against any assumption that the legal forms of person and thing can somehow

³⁹ There is one very important qualification to be made here. Gernet's doctoral thesis of 1917 (recently republished as *Recherches sur le développement de la pensée juridique et morale en Grèce* (Albin Michel, Paris, 2001) cites Durkheim as its principal influence. His later essays are collected in *Droit et institutions en Grèce antique* (Flammarion, Paris, 1982) and *Anthropologie de la Grèce antique* (Flammarion, Paris, 1982). Tim Murphy observes (Chapter 4) that Durkheim is a major proponent of the view that 'law is one of the most important, or the most institutionalised, way in which the features of society are apprehended in thought'. Thomas's view of law's social functions is clearly not Durkheimian.

⁴⁰ Gernet, *Droit et institutions en Grèce antique*, at p. 122.

embody or implement general social objectives. Contrary to the general political expectation that the legal definition of persons or things might secure the integrity of environments, genes, or embryos, and contrary to the theoretical understanding of legal institutions as discursive palimpsests in which succeeding social ideas inscribe themselves, Thomas insists on the 'cold, technical' character of legal rationality. In his essay on *res religiosae*, this critical approach is focused on the interpretation of the category of (im)purity in certain versions of the anthropology of religion. The essay is a case study of a particular form of *res religiosa* – the tomb. Whereas one would expect the laws relating to tombs and dead bodies to be saturated with social and religious meanings surrounding death and the afterlife, Thomas shows how the relevant prescriptions, while not being entirely indifferent to generalised beliefs, were developed autonomously. The tomb and its contents were defined by an institutional technique that was concerned with two interlinked questions: first, the problem of fabricating a permanent institutional entity from the various contingencies which surrounded the practice of burial; and, secondly, that of defining this institutional *res* in such a way as to secure and delimit the perpetual memorial foundations which were attached to tombs, and which benefited from significant fiscal concessions. Crudely, one might say that the legal constitution of tombs had more to do with tax avoidance than religious belief. As Thomas puts it: 'In Rome, law and legal rules were not the expression of [religious] taboos. Rather, they were instruments by which taboos were transformed into a set of techniques for the management of inheritance funds' (Yan Thomas, Chapter 2).

The first, ostensibly unremarkable, observation is that a tomb was constituted as a *res religiosa* by the inscription or incorporation of a body within it. In Roman law, a tomb was not apprehended as a purely incorporeal symbol or sign of the deceased person; rather, the *res* in question being an eminently corporeal *res* it had to be predicated on a material *corpus*. In Roman law doctrine, this was what made the difference between the constitution of a *res religiosa* as distinct from a *res sancta*. How then was the materiality of body defined? Many of the difficulties of reifying body have been accentuated or multiplied by the advent of modern technologies, and are exemplified in debates concerning the removal of tissues or gametes *post mortem*. In the case of Roman law, the difficulties arose from the circumstances of death or the peculiarity of cultural practices relating to dead bodies. For example, in the (not unusual) case of a body which had been dismembered on the battle

field, which part, or what proportion of the parts, sufficed to constitute a body? Again, this was in part a question of social belief or interpretation (in the Roman imagination the head was the chief element of the body) and in part a question of fiscal policy – if a single body were allowed to generate a number of (protected) tombs there would clearly be a number of consequences. At what point did the legal protections associated with the status of a body as a *res religiosa* begin? In the Roman world, a body might be detained by creditors of the deceased, and held as a form of illegitimate lien or security for repayment of the alleged debt. Could a regime of protection based upon the rites of burial be extended (anticipatedly, as it were) to protect a body that had not yet been sanctified or ‘memorialised’? More generally, how was the law to deal with the organic process of decay? A tomb had to contain the material *corpus* that was the body, but the actual substance was variable: ashes, bones, decaying flesh. Clearly the problem of defining what counted as ‘body’ had practical implications. Lawyers might have to determine whether bodies could be exhumed and re-interred, and graves (and the bodies they contained) might have been violated in some way. But the more fundamental question was how, doctrinally, the *res* to which legal prescriptions referred should be defined. Granted that a material *corpus* was essential to the constitution of a *res religiosa*, how should this ‘matter’ be defined? What is important here is that legal technique bypassed any reflection on the actual condition of the remains found in tombs, and reduced the properly buried body, whatever its actual condition, to a state of permanence. The body was ‘instituted’ in the sense that institutional technique abstracted it from the flux of real (that is, social, biological, or historical) time so as to immobilise it: ‘the impression of permanence that was produced by the Roman law relating to tombs, by means of its norms of inviolability, inalienability, and imprescriptibility, clothed a corporeal entity, thereby rendering it immune to the depredations of time’ (Thomas, Chapter 2). The body was, one might say, a form of institutional fiction. This was an essential technique of reification, by which bodily remains were turned into institutional ‘things’.

So, far from confirming the supposed responsiveness of Roman legal institutions to social beliefs, this example of tombs and dead bodies suggests that law was operationally autonomous. Although the categorisation of tombs as *res religiosae* implied their categorisation as ‘impure’ in Roman law, this had little to do with religious beliefs or taboos centred on the impurity of dead bodies. In law, the distinction between pure and

impure was deployed to differentiate those objects which were open to commercial exchange from those which were not. In other words, they were institutional categories which did no more than facilitate particular transactions: 'The "profane" or the "pure" were not immediate and intuitive observations of religious consciousness, no more than were the "sacred", the "religious" or the "holy", which were strictly defined institutional categories' (Thomas, Chapter 2). The question of the (im)purity of the body was elided by means of a technique which, having fictionalised the *corpus*, then focused on the *res* constituted by its inscription: the tomb. This institutional arrangement was characteristically Roman; the law protected the tomb rather than the body, the container rather than its contents: 'The jurisprudence relating to the violation of tombs elaborated the basic principle that it was the tomb, rather than the body it contained, that benefited from religious status'. These illustrations give a close-textured picture of the fabrication of things in classical Roman law, and exemplify the kind of 'innate autonomy'⁴¹ that characterised its institutions.

Reference and production

Bruno Latour's approach to legal reference is a development of his ethnography of the scientific laboratory, in which the old configuration of persons and things, or subjects and objects, is displaced by the concepts of hybrids, translation, humans/non-humans, and associative action.⁴² These concepts have now become quite influential, so it may be sufficient to point to one particular illustration; namely, the concept of 'circulating reference' that is developed in Latour's case study of soil collection in the Amazon basin.⁴³ This account of the collection and analysis of soil samples describes a process of displacement, in which each successive inscription becomes a referent for the next

⁴¹ See generally Thomas, *Fictio legis*.

⁴² The classic text is Bruno Latour, *We Have Never Been Modern* (Harvester, London, 1997).

⁴³ Bruno Latour, 'Circulating Reference: Sampling Soil in the Amazon Forest' in *Pandora's Hope: Essays on the Reality of Science Studies* (Harvard University Press, Cambridge, MA, 1999), p. 24: 'The old settlement started from a gap between words and the world, and then tried to construct a tiny footbridge over this chasm through a risky correspondence between what were understood as totally different ontological domains – language and nature. I want to show that there is neither correspondence, nor gaps, nor even two distinct ontological domains, but an entirely different phenomenon: circulating reference'.

signifying inscription: the set of superimposed maps, photographs, and coloured diagrams which domesticate the forest terrain, turning it into a rudimentary laboratory with controllable parameters; the extraction of samples by reference to this rudimentary grid, by means of a device which always takes samples of the same size; the immediate localisation of each sample by means of a record of provenance based on detailed co-ordinates; the collection of the final array of samples into a sort of multi-sectioned cabinet or specimen box in which soil distribution can be appreciated synoptically, and from which hypothetical patterns can be elicited; and, finally, the classification of soils according to a colour chart, which again accommodates the 'facts' precipitated so far to a new medium of signification – the colour code used to determine how rich in a clay a given sample might be. This is a story of continual displacement or 'transportation', of the production of reference by means of the gradual precipitation of an ever more determinate 'fact' from the transportation of reference through a chain of inscriptions:

Our philosophical tradition has been mistaken in wanting to make phenomena the meeting point between things-in-themselves and categories of human understanding . . . Phenomena are not found at the *meeting point* between things and the forms of the human mind; phenomena are what *circulates* all along the reversible chain of transformations, at each step losing some properties to gain others that render them compatible with already-established centers of calculation. Instead of growing from two fixed extremities toward a stable meeting point in the middle, the unstable reference *grows from the middle toward the ends*, which are continually pushed further away.⁴⁴

Latour's notion of 'transportation' expresses a mode of emergence in which the reference potential of words and things is not innate, but is constituted by the process which actualises that potential: 'Knowledge does not reflect a real external world that it resembles via mimesis, but rather a real interior world, the coherence and continuity of which it helps to ensure'.⁴⁵ This is the science studies version of Thomas' analysis of the involuted fictions which defined the autonomy of Roman law.

Interestingly, Thomas' anthropology of Roman legal institutions figures in Latour's approach to science studies because legal technique – or, more precisely, procedural or legal rhetoric – supplies a prototype of the kind of hybrid(ising) action that is at work in 'circulating reference'.

⁴⁴ Latour, 'Circulating Reference', at pp. 71–2. ⁴⁵ Ibid. at p. 58.

Things, and, for that matter, persons, are essential to this connection. Thomas' genealogy of the term 'thing' (*chose* in French, but one can do similar things with the English word 'thing')⁴⁶ traces its emergence back through the Roman law conception of a *res* to the term *causa*, which signified an issue, debate, or matter at hand. The point is that a term which now signifies an ontological form was once the name for a provisional nexus which held social or legal actors together in a kind of fluid or emergent bond.⁴⁷ In that sense, *chose/causa* was the name for a principle of emergent association between actors; or, to use Latour's favoured terminology, between humans and non-humans. Thus, Thomas' legal-anthropological etymology reveals the role of the thing as an 'index to the particular collective that one is seeking to bring together' [*l'indice du collectif que l'on cherche à rassembler*].⁴⁸ To return to the starting point of the introduction, one might say that juridical form, far from being the confirmation of long-standing models of action and creation, illustrates the modes of 'networked' associative action which animates laboratories, and social networks in general. But at the same time, Latour's ethnographic attention to law suggests limitations to this analogy between legal and scientific production. Both may be animated by 'hybridising' action, but conventions of personification and reification are deployed very differently in each domain, so that humans and non-humans take on different roles or functions in each. Latour's essay in this volume suggests that the distinction between subjectivity (persons) and objectivity (things) marks the difference between law and science. In fact, given Latour's notion of 'hybridising' associations of human and non-human agents, neither subjectivity nor objectivity is quite right. The essay talks about 'subjectification' and 'objectity'; the terms evoke two contrasting techniques for apprehending and transporting 'facts'.

In one sense, the production of persons and things in legal settings is an example of 'circulating reference'. The legal 'laboratory' to which Latour turns his ethnographic attention – the Conseil d'Etat – is a very peculiar kind of legal institution. As France's supreme constitutional court, it is a unique fusion of legal, political, and administrative cultures. A court can be a laboratory in the same way as an area of the forest

⁴⁶ See, e.g., Martin Heidegger, 'The Thing' in *Poetry, Language, Thought* (Harper, Row, New York, 1971).

⁴⁷ See Bruno Latour, *Politiques de la nature*, pp. 88–9 and note at p. 316, citing Yan Thomas 'Res, chose et patrimoine: note sur le rapport sujet-objet en droit romain' (1980) *Archives de la philosophie du droit* 413.

⁴⁸ Latour, *Politiques de la nature*, at p. 351.

floor can be a laboratory: as soon as one has the ingredients of circulating reference as an accumulation of layers of signification one has the elements of a laboratory. But in the case of law, the process of accumulation largely happens between the covers of a file: the effective modes of transportation are 'files, more files, nothing but files'. The scope of law's referential chains is confined to what can be encompassed and appreciated by perusing the file. And this is the essential point of difference between science and law. Science is also a textual activity – its modes of transportation depend upon the accumulation and transformation of inscriptions. But in science researchers are always concerned with multiplying transformations, of gaining additional perspectives on the 'original' facts constituted by circulating reference, whereas in law the chains of reference are sharply cut down by the procedural definitions of relevance (what Latour calls 'the limits imposed by the adversarial logic of the case') and by the availability of techniques of standardisation which, thanks to its history of professionalisation and routinisation, allow the law to resolve the facts by reference to devices such as the signature. To take one of Latour's examples, there is a world of difference between establishing whether a drugs dealer threatened with deportation 'really' has dependent children, and asking whether his lawyers had made a claim to the existence of children in due procedural form. In law, 'facts are things that one tries to get rid of as quickly as possible, in order to move on to something else, namely the relevant point of law' (Bruno Latour, Chapter 3); that is why lawyers and judges work only with the world represented in the case file. Like the more complicated layering of scientific inscriptions, the case file could be described as a map of the world. But in science all of the action takes place in the 'middle', *between* map and territory, so that there is a dynamic tension between the two registers of reference. Any 'topographic' sign is liable to be re-contextualised or re-drawn in the light of new information about the territory. In short, science is a process of reflexive *learning*. In the case of law, by contrast, the map entirely supplants the territory, and information about the territory is admitted only in such a way as to prompt an involutionary re-composition of the fabric of the law. Latour describes involution in terms of a model of *qualification* rather than fictionalisation. The formula for qualification ('A is an instance of B as it is defined by article C' (Latour, Chapter 3)) describes a discursive operation in which, rather like the Roman law technique of *fictio legis*, apprehension of the 'facts' is always conditioned by a normative premise. Inquiry into the facts is confined to the

question whether the facts are such as to trigger the application of the rule; and, as Latour observes, this is a mode of involution rather than just a mode of classification because qualification is less about cognition than it is about steering institutional action: 'this kind of ordering is of assistance in logistics rather than in judgment' (Latour, Chapter 3).

This is what makes the difference between scientific 'objectivity' and legal 'objectivity'. The engagement of the scientist is based on a peculiarly circular form of object relation; a different and much more expansive mode of involution, one might say. If there is a juridical character to laboratory science, it is not that science fulfils the common legalistic notion of what 'objective' knowledge is. Rather, it is that the object – or non-human – plays a quasi-judicial role; it ultimately 'passes judgment on what is said of it'. That is, the object is in two places at once. In one role it is the thing studied – the object that is framed and animated by the textual and technical apparatus of the laboratory. In another, it determines the truth of the claims made in respect of it by laboratory researchers in their scientific articles. Here, the particular character of circulating reference in science is important. In science, the movement of 'referential' transportation is reversible. The accumulation of inscriptions is relayed in such a way that any subsequent critic of the experiment in question could recreate the array of instruments, reagents, computers, and expertise that enabled the behaviour of the relevant fact to be observed, scrutinising the process for assumptions or tolerances that might have induced the object to perform in one way rather than another. Indeed, until this process of reconstruction has taken place, the 'truth value' of experimental conclusions or hypotheses remains indeterminate. Truth is settled after the event, once the experiment has been written up and published, by means of a process in which its conclusions are tested by returning to the 'original' object. To sharpen the analogy between the tribunal and the laboratory, Latour describes the dual role of the scientific object by reference to the ancient or mediaeval judicial ordeal, in which the behaviour of an object revealed the innermost truth about an accused. Similarly, the 'subjective' expectations and attachments of the scientist hang on the response given by the experimental object. Latour characterises this mode of engagement as 'objectivity'.

By contrast, 'the strange thing about legal objectivity is that it is quite literally object-less, and is sustained entirely by the production of a mental state, a bodily *hexis*' (Latour, Chapter 3). This adds another

dimension to the theme of the fabrication of persons and things. The contrast between law and science is also ethological in the sense that it draws out two ways of being in the world, two kinds of behavioural stance or attitude on the part of the humans engaged in the two respective practices. Latour nicely captures the differences between the two environments, beginning with laboratory scientists:

They resemble a group of gamblers huddled around a cockfight on which each has staked his fortune; they may not be shouting or screaming like madmen, but there can be no question but that they are *passionately* interested in the fate of their neuron, and in what it might have to say for itself . . . On the other hand, passion is the least appropriate term to describe the attitude of judges [*conseillers*] in the course of a hearing. There is no *libido sciendi*. No word is pronounced more loudly than another. Leaning back in their chairs, attentive or asleep, interested or indifferent, the judges always keep themselves *at a distance*.

Laboratory scientists are entirely in the thrall of the experimental object, so much so that their own 'subjective' affects and expectations are invested in the texture of the object itself. That is 'objectivity': a mode of engagement that is strangely 'subject-less'. Law, on the other hand, produces objectivity by knowing as little as possible about the object. Objectivity is an ethological effect because it consists in the production of a particular kind of bodily and environmental tone. For example, the idea of 'due hesitation': the choice of phrases, tones of voice, or procedural formulae in the Conseil d'Etat is informed by the silent strategy of always appearing to give the fullest consideration to a case (according to the formula of qualification) before the final judgment falls. But 'consideration' is an effect of institutional aesthetics and bodily *hexis* rather than a genuinely cognitive enterprise because it is generated by the 'accumulation of micro-procedures which manage to produce detachment and keep doubt at bay' (Latour, Chapter 3). In that sense, objectivity depends upon a mode of subjectification: the fabrication of things (objective facts) in law correlates to the production of persons (institutional *personae*). Both science and law are constituted by hybridising action and circulating reference, but they are differentiated by their respective ways of sculpting the roles of humans and non-humans. In that sense, the contrast between legal and scientific 'laboratories' sharpens Latour's theory of associative action.

In Tim Murphy's essay, the difference between scientific and legal reference is just as essential. Citing Niklas Luhmann, Murphy observes

that 'the law cannot be used as a machine for the investigation of truths, or for the discovery of intelligent solutions to problems' (Tim Murphy, Chapter 4). In terms of the question of making persons and things, this prompts a somewhat polemical engagement with the question of what actually constitutes 'making' in legal settings. Rather than emphasising the peculiarity of legal technique, Murphy suggests that law has to be seen as an instance of a more general form of production or technology; because production in contemporary society implies mass-production, much of modern law is itself mass-produced and/or positivised. What is important, if one develops the sub-theme of involution, recursion, or 're-potentialisation', is that mass-production implies a collapse of the division that underwrites the classical understanding of production. Ordinarily, industrial production is understood as a process in which an inventive design or an authorial intention is given shape in a mechanical form. This implies a relation in which the output or effect is commanded by the design, according to a linear process of causation. Machines, or mechanically-produced artefacts, are defined by their makers. However, Murphy's approach to mass-production implies a relation in which the essence of each product or artefact is lodged in feedback loops or processes of 're-entry'. The 'nature' of the product or output is defined by a design which is always in the process of being re-designed in the light of information gathered from the performance of the product. The best example is that of biotechnological mass-production.⁴⁹ Similarly, the autonomy of legal institutions or discourses has to be seen as a process in which legal artefacts (persons and things, one might say) are just nexes in an ongoing process of 're-potentialisation', in which the formative design of the artefact is always hostage to the evaluation of the performance of the artefact. This is what Murphy suggests in his reference to the 'mobility' of legal schemata:

Mobile grids are set in motion or, more exactly, are in motion all the time – there is no beginning and no reason to suppose an end to this kind of process – and these grids and their shifting contents are what the law and its essential technologies of reports, indexes, computer-based data storage and retrieval makes. These grid formations and classificatory schemes feed back into the processes of adjudication and legislating and law teaching via textbooks, reading lists, journal articles and the world

⁴⁹ Here, Murphy cites Knorr-Cetina (Chapter 4 at p.).

wide web. So we can say that one answer to the question what does the law make is that it makes grids – ways of organising what through its epistemic filters it considers to be facts, including facts about the state of the law.⁵⁰

In one sense, this idea of ‘mobility’ implies learning, and therefore a greater degree of openness of the institution to the social than is suggested by Thomas’ analysis of Roman law (though here, ‘openness’ should be understood in terms of the systems theory formula that openness is possible only on the basis of ‘closure’).⁵¹

THE PERSONIFICATION AND REIFICATION OF POTENTIALITIES

The remaining contributions to the volume explore the construction of legal conventions or transactions by developing two related themes. The first concerns the way in which social themes or events are folded into legal discourses to develop what might be called the ‘semantic potentiality’ of law. Secondly, with reference to the role played by biotechnology and biomedicine in the problematisation of ‘traditional’ legal conventions, our contributors develop analogies which explore the medium or substance which has become most problematic: namely, ‘body’ as a peculiar stock of potentiality.⁵²

Semantic potential

Thomas’ theory of the innate autonomy of Roman legal institutions develops the notion that legal concepts or categories are the resources from which *res* and *personae* are fabricated. The competences and capacities of persons and things are contained in the semantic potential of these categories, and are drawn out by rhetorical techniques which actualise the potential of a given convention or formula by means of argumentation. In that sense, the entities that surface in legal procedure are really artefacts of the procedure itself rather than descriptions of external social or psychological events. One might say that the institutional force of Roman law consisted in its capacity to capture ‘real’

⁵⁰ See Murphy, Chapter 4.

⁵¹ See generally Niklas Luhmann, *Social Systems* (Stanford University Press, Stanford, 1997), ch. 5.

⁵² Dropping the article, in the manner of Caroline Walker Bynum, *The Resurrection of the Body* (University of California Press, Berkeley, 1988) is one way of highlighting this potentiality.

persons and things in these conventional artefacts. So, for example, the imposition of legal liability depended not upon some exploration of the psychological motivations or processes of the individual, but upon the ability of the advocate to ensnare an individual in a formula which was 'prefabricated' in the sense that it was prepared by rhetorical invention entirely within the time of the trial:

The very idea that one might be bound by one's actions was foreign to Roman thought, which treated subjects as the accessories of actions. The relationship implied by the formula *noxae se obligare* (meaning 'to bind oneself to one's action' and not 'by one's action') is quite the opposite of that which defines personal obligations in the contemporary sense. The misdeed (*noxa*) tightened retroactively around the guilty person. The latter was not so much an agent, as the captive subject of the wrong, tied or bound to his action; the point is not that he was not required to answer for it, but that in a very specific sense that he was held in the grip of the law: *actione teneri*, meaning: to be held by a legal action.⁵³

Thus, the Roman legal imaginary was one in which persons and things were the (semantic) incidents of legal formulae or conventions. The 'action' of personification and reification happened entirely within the institution, and they expressed what might be called encrypted institutional potential.

Engin Akarlı's and Martha Mundy's illustrations from Ottoman-Islamic law suggest variations on this notion of semantic potential. In contrast to Thomas' picture of a strictly autonomous institution, Akarlı emphasises that the place of adjudication in the 'Ottoman-Islamic legal ethos' was such that 'courts made and remade the laws, in the practical sense of the word as binding provisions, with the participation of those actors to whom the provisions would apply' (Engin Akarlı, Chapter 6). The legal records suggest that even in the imperial court, doctrinal forms and conventions were the media through which law accommodated, and through which it accommodated itself to, the increasing social complexity of claims. The study focuses on the category of *gedik* in Ottoman jurisprudence and practice, describing the process of evolution through which the concept was loaded with a semantic potential which allowed it to hold a number of quite heterogeneous elements. *Gedik* described the tools of an artisan's trade, the market position

⁵³ Yan Thomas, 'Acte, agent, société: Sur l'homme coupable dans la pensée juridique romaine' (1977) 24 *Archives de la philosophie du droit* 63, at p. 71.

enjoyed through the use of those tools, the participation of the artisan in a guild, the certificate which constituted security for debts contracted by the artisan, or an item of inheritance. The complexity of the claims within this arrangement, the shifting matrix of persons and things, is illustrated by the example of the problems faced by merchants dealing with artisans who defaulted on their obligations. In these circumstances the *gedik* certificate might turn out to be a worthless security because nothing in the structure of guilds prevented an artisan from alienating the assets indexed by the certificate or from leaving the guild to set up as an artisan elsewhere. The doctrinal construction of the rights and obligations articulated by the category of *gedik* therefore implied the precipitation of persons and things out of a form which could *potentially* be either, depending on the nature of the claim. For example, as with any corporate entity, this involved a complex bundle of personifications: the agency of the corporate persona acting as such vis-à-vis the outside world, the agency of that person with respect to its members, the *personae* taken on by members *inter se*, the capacities and competences of artisans vis-à-vis merchants or secular and religious institutions. This was not just a question of resolving the corporation into its component elements, because that is a more complex business than a mere enumeration of roles might suggest.⁵⁴ Rather it is about the creation of persons/things out of what might be termed a 'multiplicity'. For example, in determining the right to inherit a *gedik*, legal doctrine had to reckon with the fact that an artisan as the holder of a *gedik* was *simultaneously* a member of the guild, an economic actor in his own right, a member of a family, and a representative of a lineage. The personal relations and attachments compressed into this multiplicity could be actualised by techniques of personification and reification which would be deployed differently, and to different effect, where the nature of the claim was different. That is the sense in which the *gedik* was (like the human body in the contributions discussed below) a semantic form from which either persons or things could be actualised.

Martha Mundy's essay is a companion study in the construction of semantic potential. It concerns a question of doctrine: did the holder of an administrative grant of land in Mamluk/Ottoman Egypt have a property right which was capable of alienation? The grants in question were

⁵⁴ For an example of how a single *persona* can be split into a number of different existences, see the discussion of Marx and Rousseau in Gillian Rose, *The Broken Middle* (Blackwell, Oxford, 1992).

usually made to military officers or religious functionaries, who were allowed to take a proportion of the tax revenues due to the sovereign. In that sense, the grant could be seen as remuneration for service, and as a right revocable by the sovereign at any time. In these circumstances, could a military holder alienate his right by renting it out, effectively treating it as a usufructuary property right? Two closely-related doctrinal issues arose at that point. First, was the right to be conceived in terms of property or office? that is, was it a right attached to (or reified in) the land, or was it an incident of the grantee's office? This question was complicated by the fact that the grant might be revoked by the sovereign at any point, so that the *res* in question was of precarious status and undefined duration. Secondly, if it was to be seen as a right in the land, how could the *res* be defined where its essence was constituted by the tripartite personal relations between sovereign, grantee, and the actual cultivator of the land? The fact that the essence of thing was so thoroughly 'personified' raised 'the tension between the basic idioms of ownership by an individual of a thing and the office-like hierarchy of the three *personae* (ruler, grantee and cultivator) who all hold rights in the same land' (Martha Mundy, Chapter 5). The point is that the specification of the rights and responsibilities attached to land implies the (re)construction of doctrinal models of persons and things. These models are not just found in society; they have to be constructed conceptually or semantically by law, from its own resources of meaning. In one phase, this implies reaching beyond the institution to formulate representations of evolving social realities. So, for example, the legal treatise that is central to Mundy's account looks beyond the bare legal conventions to the real, social, character of the role of the right-holder (the military grantee), and the nature of agricultural production (the social status of agricultural labour) to argue for the proposition that an abstract usufructuary right should be recognised by this branch of Islamic jurisprudence (Mundy, Chapter 5). But in another phase, these infused meanings have to be expressed in 'traditional' idioms and conventions. The ability to formulate new models presupposes an ability to find semantic prototypes within the doctrinal tradition. In this case, the prototype for an abstract usufructuary right is found in existing conceptions of slave labour: 'the potentiality arising from the labour of a slave allows the development of more complex formulations of rights over real property' (Mundy, Chapter 5). At this juncture, the semantic potential of doctrinal categories merges with the potentiality of 'body', and the reference to slave labour can be seen as

drawing on what the remaining contributions describe as the peculiarly equivocal character of the human body.

Actualising bodily potential

Conventional techniques of personification and reification are opened up to ethnographic comparison by exploring the potentialities contained in 'body'. Marilyn Strathern takes the question of bodily form as the basis for an analogy between Western and Melanesian conventions of personification and reification. What is in question is the production of bodily 'wholeness', that is, the way in which the body is – or is not – reified as a determinate thing. 'Wholeness' in this sense is one particular aspect or effect of those conventions which shape the 'manner in which people make claims on others', though at least in the case of Melanesia these connections might be 'of a politico-ritual rather than legal nature' (Marilyn Strathern, Chapter 7). The question is how the potentialities associated with body are actualised in such a way as to give effective form and force to ownership claims. In the case of Western law, this might imply an oscillation between person and thing. For example, Strathern has described elsewhere how a frozen embryo changes its potentiality depending on whether or not it has been defrosted, referring to the 'ontological choreography by which embryos can go from being "a potential person" when they are part of the treatment process to "not being a potential person" as when it has been decided that they can be frozen or discarded, or even back again as when they are defrosted'.⁵⁵ Thus, depending on the nature of the relation actualised by the claim, body itself can be actualised as different kinds of 'form'. And this is not just a matter of recording biological facts: 'one effect of unanswered questions about whether or not body parts constitute property is the realisation that detachment must be fabricated conceptually as well as physically' (Strathern, Chapter 7).

Bodily potential poses particular problems for Western legal conventions. As Strathern observes, 'the body seems to be taken as entire in the double sense of being a complete functioning (or once functioning) organism, and of being of a piece with the individual person as subject and agent'.⁵⁶ This sense of biology as being 'of a piece' with psychic or social individuality is an unexamined presupposition of modern legal doctrine. Yan Thomas' anthropology of Roman legal institutions

⁵⁵ Strathern, *Property, Substance, and Effect*, at p. 175, citing Cussins.

⁵⁶ Marilyn Strathern, Chapter 7.

suggests that law once recognised that personality was multiple and contingent. First, there was no such thing as a unitary legal *persona*; instead Roman law dealt in a large number of differentiated transactional *personae*. Secondly, the legal quality of personality was not taken to be descriptive of biological or social individuality. So a human being might be classed as a thing (*res*) for some purposes; for example (leaving aside the obvious but problematic example of slaves) grandparents counted as part of the inheritance (*familia*) to which the incoming heir succeeded. Only much later in the tradition of Roman law were the various transactional *personae* constituted by legal technique amalgamated into the form of a single legal *persona*, and only with the infusion of Christian doctrine (specifically, the doctrinal conjoining of mortal, perishable, body and immortal soul) did this artificial person merge with its biological substratum to compose a 'whole' form. Initially, one might say that this gave a particular importance to the body, which encompassed both person and thing. In that sense, the body 'unified' the distinction between person and thing in the sense that it was the third term which, logically, guaranteed the distinction. At the same time, the body was the medium or currency in which the distinction between person and thing was negotiated; depending on the condition of the body, a human being might be said to be either a person or a thing. Hence the prominence of the question of slavery in legal doctrine and philosophy. If some compulsion could be exercised over the body so as to reduce it to subjection or turn it into a commodity, the human being *became* a thing. This was a one-way route: persons lapsed into things, not the other way around. In other words, 'person' was the weighted side of the distinction, and the body was just the medium through which the person was exposed to the danger of becoming a mere thing. So, for example, in French law the body is treated as a very special sort of entity not because the law respects the body as such, but rather because the body is a form which engages respect for the person. In this traditional arrangement, the body was neither person nor thing – it was just the gage through which the person staked its personhood. This was sustainable precisely because the body was always whole, so that the distinction between person and thing always passed between two whole forms (bodies) rather than through the 'whole' form of the body. For present purposes, what is significant about this fabrication of wholeness is that the body was the form in which the potentiality or equivocation of the distinction between person and thing was actualised or made determinate.

The problem for contemporary Western legal conventions is that the distinction now passes *within* each individual body (at least potentially). Body parts, genes, and gametes are now 'detachable', and might circulate independently of any whole body. In these circumstances, body continues to function as a unification of the distinction between person and thing, and as the form in which the potentialities of that distinction are actualised. But the geometric point of unity or actualisation has changed. 'Wholeness' has to be fabricated by making body abstract, by exploiting its equivocal status as both person and thing to fictionalise its continuing integrity. This is what Strathern calls 'fabrication by default'. In her discussion of the Nuffield Council on Bioethics Report of 1995 on the status of body tissues (a text which she takes as 'a treatise on the making of things') Chapter 7) Strathern illustrates what this mode of fabrication involves:

In a wonderfully illogical but perfectly sensible way, at the very juncture when through detachment it could be regarded as having ceased to be a part of the body, the tissue or organ is reconstituted neither as a whole entity in itself nor as an intrinsic part of a previous whole. Colloquially, it is, somehow, a free-standing 'part'. So what is kept alive in this nomenclature is the process of detachment itself: it would seem that for so long as its detachability from the person remains evident it can be thought of as a 'thing' – but not to the lengths of a 'whole thing'.

Each detached part – precisely because it is still characterised as a part – remains characterised by the whole of which it was once an integral part. By keeping the process of detachment alive, bio-ethics holds in suspense the question of how to differentiate person and thing with respect to the body. More importantly, this fabrication of 'wholeness' allows the body to continue being the gage upon which personhood is staked, and as a result the distinction between person and thing remains cast as an asymmetrical *division*. The sense in which fabrication by default keeps the old configuration of person/thing/body alive is perhaps clearer in another legal strategy, based on an extrapolation of an intellectual property right (or, in this case, a *droit d'auteur*). The suggestion is that body 'parts' should remain attached to their qualifying 'wholes' by means of a *droit de destination*, which is the right attributed to authors in French intellectual property law to determine the conditions under which a work can be published or exploited.⁵⁷ Body tissues would

⁵⁷ See Jean-Christophe Galloux, 'L'utilisation des matériels biologiques humains: vers un droit de destination?' (1999) *Receuil Dalloz (Chronique)* 13.

remain attached to the original whole by the continuing attachment implied in the consent which authorises and delimits each particular use. To make a body part a separate, distinct, entity would mean having to make a decision as to precisely where the line between person and thing should be drawn, which would, in turn, unravel the productive equivocation comprised in body.

Fabrication by default is motivated by anxieties about the ownership of persons: slavery. But in reality the old problem of slavery, and the conjunctions of person and thing which were implied in political-philosophical discussions of slavery, have been superseded. The ethnographic analogy which Strathern constructs on the basis of examples from Melanesia shows a context in which persons are 'owned'. The analogy is necessarily a construct; it appears as a result of rendering anthropological material as 'like – rather than unlike – Euro-American assumptions'. The Melanesian examples shows how persons can appear as distinct, whole, things and therefore as objects of ownership. 'Wholeness' in this context is a bodily quality. If the Melanesian person is composed of multiple relations, then the moment in which they become a thing and hence an object of ownership is the moment in which their relational potentiality is entirely eclipsed by the identity and relation which is being actualised in the present moment. This proposition condenses Strathern's rendering of the virtual multiplicity of the Melanesian person. Although the theory is too complex to be addressed here,⁵⁸ it is important to say something about how the theme of ownership sets up an analogy between Melanesian fabrications of bodily form and Western anxieties about the reification of the body.

In the Melanesian context, bodily form can be described (by analogy) as the subject matter of ownership because each reification is elicited by the person(s) to whom it is addressed (Strathern, Chapter 7):

When a male initiate steps forward all decked out in his transformed body, a new member of the clan, his clansmen own so to speak the concept of this person as 'a male clansman'. He has to look, act and behave like one. His clan mates acknowledge him by claiming him; they see in him, at that moment, the embodiment of a concept.

The concept in question is a conventional form or role – that of the 'male clansman' – which has to be actualised in a bodily performance.

⁵⁸ The definitive account of the 'fractal' nature of Melanesian persons is given in Marilyn Strathern, *The Gender of the Gift* (University of California Press, Berkeley, 1988).

Effects have to be contrived; or, to use Strathern's terminology, conventions are constituted through invention. A convention is 'a recipe for social action',⁵⁹ but a 'recipe' in this sense is a virtual scheme whose effective form is constituted by the actions that it elicits. The Melanesian convention of compensation⁶⁰ supplies an excellent illustration because 'the compensation process itself defines what is transactable'.⁶¹ The point is that the substantial elements to which a compensation claim refers are actualised – that is to say given effective form and force – in the *making* of the claim. In the course of making their claim, social groups (and persons) actualise themselves, resolving themselves into the form appropriate to the claim they seek to sustain: 'collectivities differentiate, identify, and, in short, describe themselves by their role in compensation'.⁶² Each actualisation of a convention is a singular event because it consists entirely in the aesthetic and corporeal effect achieved by actors in the very moment of exchange. Unlike the fabrication of wholeness exemplified in the Nuffield Council's report, this mode of detachment is decisive: 'the person appears whole and entire from the perspective of a specific other'. Wholeness is effected in *bodily* form, so that reification or actualisation is, so to speak, an effect of corpo-reality.

On the other side of the analogy, the Western understanding of ownership (and hence slavery) is predicated on an antithetical relation between persons and things, an antithesis which strategies of fabrication by default try to salvage. The model of an antithetical or

⁵⁹ Ibid. at p. 271.

⁶⁰ 'Compensation' as it is generally understood in Papua New Guinea does everything which an English-speaker might imagine, and much more. It refers both to the payment owed to persons and to the procedures by which they come to negotiate settlement. It can thus cover recompense due to kin for nurture they have bestowed, as in bridewealth, as well as damages, as in reparations to equalise thefts or injuries. It can substitute for a life, in homicide compensation, or for loss of resources. Car fatalities, war reparations, mining royalties: all potentially fall under its rubric, although since it is generally agreed that people frequently make exorbitant demands, compensation is seen as the enemy as well as the friend of peace-making ceremonies and of commercial exploitation alike. Its outcome is, from a Euro-American point of view, hybrid, insofar as it consists in an equally easy translation of persons into things and things into persons. And its procedural capability is of utmost simplicity. Liabilities and claims are defined by the positions parties take in relation to one another over the issues of compensation itself (Marilyn Strathern, *Property, Substance and Effect* (Athlone, London, 1999), p. 188).

⁶¹ Ibid. at p. 190. ⁶² Ibid. at p. 191.

asymmetrical relation between persons and things imposes a particular understanding of originating action (production). At the level of content, the Western idiom of ownership construes (proprietary) agency in terms of what persons do to or with things by means of their labour or knowledge. The body presents a special problem for these conventions precisely because it represents the point at which the terms of this division become indistinguishable. But until the question of body presented this new issue of potentiality, Euro-American conceptions of property imposed an understanding of cause/effect, or potentiality/actuality, in which social action could be referred to the capacities of things or the subjective competences of persons. This is one implication of what Bruno Latour calls the 'old settlement'; the division of the world into two ontological registers. The effect of superimposing Western modes of personification and reification on the Melanesian examples is to reveal a mode of originating action based on symmetrical relations between *persons*. The basic units of social action are just persons: persons can be reified (in whole body form) and things can be personified, in which case they embody one of the virtual relations which compose the Melanesian person. In this sense the social world is not divided into two registers, but is composed of relations and attachments (distinctions, one might say) which are elicited from the symmetrical plane of 'personality'. Social action is not predicated upon the potentialities lodged in some original division. Instead, it consists in modes of *actualisation* which constitute their correlative potentialities. At this point, Strathern's ethnographic analogy suggests a resonance – if not a proximity – between Melanesian and Euro-American contexts. The strategy of fabrication by default is one way of coping with a world which, through the agency of biomedicine, is increasingly recognised as a single plane of potentiality. Where body can be *either* person *or* thing the old asymmetry becomes dis-embedded, motivated only by emergent regulatory objectives (witness the shift to risk analysis and proceduralisation in bio-ethics).

Susanne Küchler's essay sketches another approach to the actualisation of attachments. Her approach can be seen as an inflection of a theory of art which 'merges seamlessly with the social anthropology of persons and their bodies, allowing for the possibility that anything could conceivably be an art object, including living persons'.⁶³ 'Re-thinking

⁶³ Susanne Küchler, Chapter 8.

attachment' is the rubric under which the question of personification and reification is addressed. 'Attachment' evokes the array of relations (between persons/things) indexed by art objects, and the agency of these objects in eliciting and exchanging potentialities *between* persons/things. The theme of potentiality is central to the inquiry because the question of attachment – posed in this way – opens up ethnographic analogies between the understandings of origination, generation, reproduction, and replication which sustain Western idioms of intellectual property and (in this case) Melanesian modes of connectivity. In that sense, the essay can be read as a contribution to contemporary anthropological engagements with Western discourses or technologies of intellectual property rights (copyright and patent).⁶⁴ More specifically, it develops some of the themes introduced in Küchler's earlier work on Malanggan carvings.⁶⁵ The Malanggan in question are produced as embodiments of (or for) the life force of an ancestor. Everything turns on what 'embodiment' might mean in this instance. The peculiarity of Malanggan carvings is that their role as vessels or embodiments is short-lived; they are destroyed or discarded immediately after their use in memorial ceremonies, at which point the life force condensed in them is released. What kind of agency is implied in this articulation (embodiment and release)? In the process of being produced as an embodiment, the Malanggan takes on the form(s) of the Melanesian person. The carving is an assemblage of design motifs, some transmitted from the past, others drawn from neighbours, and yet others which are addressed to future 'owners' (and which in so doing anticipate their future apprehension as communications from the past). This nexus of recollection and anticipation instantiates the potentiality of body: 'a Malanggan converts existing relationships into virtual ones, matter into energy, and living into ancestral agency – heralding the reversal of these transformations at a future stage in the reproductive cycle'.⁶⁶ What is

⁶⁴ See the now classic article by Simon Harrison, 'Intellectual Property and Ritual Culture' (1991) 21 *Man* (n.s.) 435.

⁶⁵ See especially Susanne Küchler, 'Malangan: Art and Memory in a Melanesian Society' (1987) 22 *Man* 238; 'Making Skins: Malangan and the Idiom of Kinship in New Ireland' in J. Coote and A. Shelton (eds.), *Anthropology, Art, and Aesthetics* (Clarendon Press, Oxford, 1992); 'The Place of Memory' in A. Forty and S. Küchler (eds.), *The Art of Forgetting* (Berg, Oxford, 1999).

⁶⁶ Marilyn Strathern, 'The Patent and the Malanggan' (2001) 18(4) *Theory, Culture and Society* 1, at p. 7.

essential here (at least as regards the issue of intellectual property) is the mode of potentiality or 'potentialisation' which this implies. In giving a formulation to past attachments, the Malanggan is an articulation which carries those attachments forward, into a future which it has in some sense configured through its own agency, so that it functions as an agent of restless transformation or emergence. This is, one might say, a 're-potentialisation' of the past in anticipation of its effects in a future present. If one needed an example of the inapplicability of divisions between tradition and modernity, it would be difficult to find a better one than this.

The analogy with Western idioms of intellectual property takes shape at this point. In patent law, the reification (embodiment) of an industrial concept turns it into an object or *res* which can then be licensed for use, or used 'negatively' by competitors trying to 'invent around' the patent. In that sense the intangible *res* – the patent – is also a transformative articulation between two skeins of attachment(s). The configuration or (re)collection of one set of attachments (the network gathered into the patent, one might say) occasions the opening of another network, which transforms the 'old' network by holding it up to the 'new' context into which it has opened.⁶⁷ As with the agency of the Malanggan, the point is that the potential that is (provisionally) actualised in the patent is always being re-made, or re-actualised. Contrary to the image of origination which sustains the idioms of intellectual property law, and property law in general, the work of actualisation constitutes the potential that it actualises.⁶⁸ That, at least, is one sense of the 'virtuality' of the Malanggan as an embodiment. But at the same time, proximity opens up analogical distance. The agency of the Malanggan becomes one side of an analogy which 'relativises' Western idioms. The Malanggan is what Küchler describes as 'an inherently recallable image'; the destruction of the carving after its ceremonial means that it continues to exist only as the 'concept' of the design. In this sense again one might say that Malanggan designs circulate within a regime of intellectual property. The person to whom the design is 'entrusted' has the right to reproduce it. However, this opens up an analogical distance because the 'concept' is not understood as an intellectual creation of an originating author (even if the author is not the

⁶⁷ Again, the essential reference is to the work of Marilyn Strathern, notably 'Cutting the Network' (1996) 2 *Journal of the Royal Anthropological Society* 517.

⁶⁸ For philosophical accounts of this, see Gilles Deleuze, *Le pli* (Minuit, Paris, 1988); Giorgio Agamben, *Potentialities* (Stanford University Press, Stanford, 1999).

current holder of the right). The design is simply 'held in the head'⁶⁹ of the person authorised to reproduce it. Again, this is a mode of embodiment that is sustained without reference to a division between personal, subjective, agency, and material capacity.

In her contribution to this collection, K  chler elaborates this notion of a transformative articulation by elaborating the theme of 'surface' as an aspect of the 'allure' of art objects. Surface was already an important part of K  chler's interpretation of Malanggan as exemplars of a planar (as opposed to linear) conception of surface.⁷⁰ Here, the surfaces in question are textiles: techno-textiles, Yupno knotted cords, and *tivaevae* quilts from the Cook Islands. In these examples, the theme of 'surface' locates a point in which potentiality and actuality become co-extensive, existing in the same plane or dimension, and articulating emergent relations which cannot be fixed as ownership or possession. The *performance* of techno-textiles draws the poles of the Western division into a dynamic 'middle': at each point, fixed antitheses become emergent forms. For example, these are textiles which 'behave like organisms, displaying a second nature comprised of rule-ordered human constructions while mirroring the given, pristine nature of physical and biotic processes, laws and forms' (Susanne K  chler, Chapter 8); in that sense, they play on the division between real and artificial by dissolving it into a process in which the registers become indistinguishable. As K  chler observes, these textiles are like the 'synthetic vitality' of artificial life programmes. As I suggest in my contribution, this mode of symmetry is expressed in Gilles Deleuze's concept of a simulacrum: 'a simulacrum is not an imperfect copy [*une copie d  grad  e*], it contains a positive power that negates both original and copy, both model and reproduction'.⁷¹ A similar argument is expressed in K  chler's observation that techno-textiles turn tailoring into 'a problem of fibre, not figure' (Susanne K  chler, Chapter 8). Fibre lies 'between' the two registers which traditionally define the place of 'tailoring': figure and function, substance and ornamentation, body and apparel. Intelligent fibres, which can respond to environmental (that is, physical *and* social) conditions by (for example) changing their heat-retaining capacities or their sensitivity to light, or by changing patterns or colours, effectively

⁶⁹ The phrase is from Marilyn Strathern, 'Divided Origins' (ms.).

⁷⁰ Susanne K  chler, 'Binding in the Pacific: The Case of the Malanggan' (1999) 69(3) *Oceania* 145.

⁷¹ Gilles Deleuze, *Logique du sens* (Minuit, Paris, 1969), p. 302.

modulate the distinction between figure and clothing, actualising their respective potentialities.⁷²

This kind of ongoing modulation of relations and attachments is also evidenced by the Melanesian examples. Yupno knottings hold potentiality in their texture; they are strings of knots representing ancestral place names, each knot being a determinate representation and yet it being unclear which place name it represents, so that the topology represented by the names has to be actualised by each 'reader'. And yet a 'reading' can make or break a life. The *tivaevae* quilts are layered with flower motifs, all 'held together by the stitched lines of thread visible as a continuous line on the underside of a quilt' (Susanne Küchler, Chapter 8). Like the Malanggan, they also articulate co-existing property rights, because the design of each layer 'belongs' to a different woman, household, or clan. In the case of *tivaevae*, which transpose the old layerings of barkcloth with layerings of cotton, it is no exaggeration to say that the availability of a new cloth with new tensile qualities 'facilitated a development of surface and *thus* of new forms of property' (emphasis added) by enabling many layers or attachments to be (re)collected together. But in some respects, the surface of the *tivaevae* quilts is different from the surface of the Malanggan. But the fact that ordered relations are (re)collected in a single surface transforms their potentialities. Far from being the fixed co-ordinates of a terrain, they become like the knots in Yupno cord; that is, they acquire the relational value that is attributed by each reading of the surface, or each time a fresh attachment is made 'through' the surface of the quilt. So although in one sense the *tivaevae* quilt tells an ordered story of proprietary or possessory attachments, in another sense it is a resource or medium through which these conventionalised attachments are dissolved into a flux that is fixed only by the making of new attachments. The complex agency of body, as transposed to the agency of the Malanggan, is located in the medium of 'surface'.

In my contribution, the exploration of bodily potential and images of 'organic' action shifts from surface planes to interiorised processes. Various legislative and bio-ethical interventions have sought to institute gene sequences as 'the heritage of humanity'. This notion of genetic patrimony attempts to domesticate the potentialities elicited by biotechnology by characterising genes in terms of the old division

⁷² For a critique of the attribution of intelligence to materials, see Bernadette Bensaude-Vincent, *Eloge du mixte* (Harmattan, Paris, 1998).

between persons and things. Ironically, the old (Western) legal institutions of inheritance freely deployed some quite sophisticated techniques of personification and reification which enabled the division between persons and things to be affirmed as a primordial condition while at the same time, in practice, that division was superseded by ciphers (intention, money, writing, blood, and land) which were equivocal or 'hybrid' in the sense that ciphers from either register could be actualised either as persons or as things. But the argument for genetic patrimony passes over this 'alternative' history of inheritance. Indeed, I suggest that genes are apprehended as the ultimate objects of inheritance. Whereas the old institutions of inheritance were thoroughly improbable constructions, whose apparent stability was secured by their capacity to metabolise the contingencies of kinship and society, our genetic inheritance is based on a natural force rather than an institutional effect (Küchler, Chapter 8). This representation depends on what could be called the 'juridification' of gene action; that is, the representation of genes as normative forces. The all too familiar characterisation of the human genome as the 'alphabet of human life' collapses bodies into genes by the familiar route of a linear process of translation and transcription: the person comes to incarnate a supra-individual value. This gives rise to a complex choreography of personification and reification, and my contribution focuses on the model of institutional time which organises that choreography. The temporal scheme of inheritance pre-exists (and perhaps informs) the science of genetics, so that a juridical model of time is located both in norm and nature, law and biology. Cast in the conceptual language used at the beginning of this introduction, one might say that the temporal order of the institution is structured by divisions rather than distinctions. But, although the institution presupposes an external, 'objective', temporal horizon, in effect the institution *produces* the horizon upon which it founds its operations. The prototype for this operation is found in the primordial legal myth of institutional origin – autochthony – in which the essential origin of the institution is constituted by its current operations. And, far from reinforcing the old fantasy of inheritance, law's encounter with genes, and hence with molecular biology, confronts it with a model of self-production which has always been the motor force of legal institutions. Law might be described as the original biotechnology, but only because it produced human life by techniques of personification and reification which were just as radically creative as the techniques of commercial biotechnology.

CHAPTER TWO

RES RELIGIOSAE: ON THE CATEGORIES OF RELIGION AND COMMERCE IN ROMAN LAW

Yan Thomas

Roman lawyers were often faced with the task of giving a strict definition to tombs. First, they had to define the scope of application of a law against the violation of sepulchres that had been introduced by the urban *praetor*. This was a rule of criminal law punishable by a pecuniary fine. It protected the funerary edifice itself, in both its tangible entirety and its external integrity. The commentaries specify, case by case, what counted as a part of the *sepulchrum*. The prohibition applied to any form of violence done to the monument built over the sepulchre, notably any act of breaking, removing, or displacing the stones of the tomb, its marbles, statues, or columns, or its ornamental features. These lists of materials and objects were provided in an attempt to define a very particular kind of crime, one which apprehended the profaning act by referring to the thing profaned. It was also quite common for private individuals themselves to specify in comminatory sepulchral conditions the precise extent of their tomb, using the geometric techniques of the surveyor to define its exact breadth and height. In all cases it was necessary to delimit the space of the sepulchre, either legally or geometrically, in order that it might be sanctuarised. In other words, the dead were to occupy only that space which was strictly assigned to them. The inviolability of religious places required that the perimeter around the spaces reserved for the dead be defined with absolute clarity: what was at issue was, of necessity, a place, the *locus*¹ of

Translated by Alain Pottage.

¹ On the status of *locus religiosus*, see generally F. de Visscher, *Le droit des tombeaux romains* (Milan, 1963), pp. 55 *et seq.*

a 'determinate part of a fund' (*aliqua portio fundi*).² As Cicero put it, the limits of inviolability were inscribed in the soil itself.³ Thus, the tomb defined the perceptible limits of a prohibition addressed to the living. But by the same token it defined the domain that was left entirely open to them as a *locus purus*.⁴ This way of setting up a prohibition admitted of no equivocation or ambiguity. Limits were known because they were clearly established. They were given perceptible form by the particular area of the soil, by the monument built upon it, and by the materials used to build that monument: stones, marbles, columns, and statues.

A second rule, which made tombs inalienable, required a similar degree of exactitude. What was safeguarded from human violence was also withheld from human exchange. The texts state quite clearly that neither the places reserved for the dead nor the monuments erected above them were heritable⁵ or marketable.⁶ They could not be sold (so that, for example, the usual form for a sale of real property included a term excepting tombs or consecrated places),⁷ subjected to a servitude,⁸ claimed as private property,⁹ acquired by prescription,¹⁰ used as the basis of a guarantee,¹¹ seized as a security,¹² or made the subject matter

² Ulpian, *D.* 50, 16, 60 pr.

³ Cicero, *Phil.* IX, 14; *sepulchrorum autem sanctitas in ipso loco est*. It should be emphasised that *sanctitas* here describes the inviolability of something bounded by defined limits.

⁴ See de Visscher, *Le droit des tombeaux romains*, at p. 333.

⁵ Labeo *ap.* *D.* 43, 24, 13, 5; Ulpian, *D.* 8, 5, 1; cf. Gaius 2, 1; 6.

⁶ Pomponius, *D.* 18, 1, 6; Paul, *eod. tit.*, 34, 1; *Sententia Senecionis de sepulchris*, *CIL* X 3334 = *ILS* 8391 = *FIRA* III no. 86, l. 15 *et seq.*

⁷ On inalienability, see Ulpian, *D.* 11, 7, 6, 1; Philip, *C.J.* 3, 44, 9. On clauses excepting tombs, see Labeo, *D.* 19, 1, 33, 1; on sacred or religious places, see Sabinus, *ap.* Ulpian, 28 *ad Sab D.* 18, 1, 22; on the sacred, religious or public, see *D.* 18, 1, 24; cf. Paul 5 *ad Sab.*, *eod. tit.*, 23.

⁸ Javolenus, *D.* 8, 4, 4.

⁹ Paul, *D.* 6, 1, 23, 1; 43; Al. Severus, *C.J.* 3, 44, 4 pr.

¹⁰ M. Kaser, 'Zum römisches Grabrecht' (1978) 95 *ZSS* 15, esp. at p. 74 *et seq.*

¹¹ *C.J.* 8, 16, 3, a. 215; 3, 44, 2, a. 216.

¹² This can be inferred from the right of seizure granted in respect of sumptuary annexes (see n. 17 below), and also from the fact that it was not forbidden to found a tomb on a piece of land given as a security: in such a situation, the *locus* acquired religious status (*D.* 11, 7, 2, 9). This concession to the debtor would make no sense if the tomb was in danger of seizure by the creditor; quite the contrary, it presupposes that the immunity of the tomb could be invoked by the debtor against the creditor.

of a stipulation.¹³ In this context little turns on the question whether this exclusion was absolute in character, or whether, on the other hand it was functional in that it was restricted to the funerary dedication of the land, in which case a sepulchre could have been sold either in whole or in part on condition that its funerary vocation was maintained in perpetuity (which is the solution suggested by the epigraphic sources, supported by archaeological data).¹⁴ Obviously, this rule of inalienability, which bound some forms of property indefinitely, required a precise definition of the ground covered. Indeed, those who founded tombs were tempted to extend the same regulations to the lands and gardens that surrounded their tombs, the object being to ensure in perpetuity the income necessary to pay for the veneration of their memory – the sacrifices, libations, and commemorative banquets in the course of which, throughout the empire, the living feasted alongside the dead, with whom they shared their meals.¹⁵ They often annexed to the *locus religiosus* a property amounting to a funerary foundation: gardens, *horti* or walled cenotaphs, vines, orchards, or entire agricultural estates, comprising the various buildings which serviced the tomb – dining rooms, inns, solariums, water-tanks, and pools.¹⁶ Founders attempted to apply the rules of the *ius sepulchri* to these sometimes vast annexes by extending sepulchral clauses beyond their proper object.¹⁷ However, the effectiveness of these clauses could not be guaranteed. The wishes of the deceased came into conflict with the law, which drew a clear distinction

¹³ Paul, *D.* 45, 1, 83, 5.

¹⁴ See de Visscher, *Le droit des tombeaux romains*, at pp. 65 and 106, and Kaser, 'Zum römischen Grabrecht', at p. 60.

¹⁵ For reference to these funeral banquets, which were practised by both pagans and Christians, see R. MacMullen, *Christianisme et paganisme du IV^e au VIII^e siècle* (Paris, 1998), p. 153.

¹⁶ See the epigraphic material collected by J.M.C. Toynbee, *Death and Burial in the Roman World* (London, 1972), p. 94.

¹⁷ On clauses rendering lands reserved for a foundation inalienable, see *ILS* 8342, Grazzano; on the imposition of servitudes for funeral banquets on gardens, by means of the clause '*hos hortos neque dividi volo neque abalienari*' see *ILS* 9271, Tarragone. See also the inscription of Junia D.F. Libertas à Ostia, which made the usufructary rights of the estate and its buildings, which could not be alienated outside the *familia*, dependent on the tomb (G. Galza (ed.), *Epigraphica* (1939), p. 160 *et seq.*, and F. de Visscher, *La fondation funéraire de Junia Libertas d'après une inscription d'Ostie*, *Studi S. Solazzi* (Naples, 1948), pp. 532–3). The formula '*huic monumento tutelae nomine cedunt*' was of current usage: in addition to the texts cited, see the numerous examples in *ILS* 8843.

between the tomb, which was forever inalienable, and its outworks, which were alienable.¹⁸

A number of rules and practices confirm that the definition of tombs was not a matter of private intention. For example, in the sale of real property, where the seller of a plot of land sought to avoid the rescission of a sale by excepting those places reserved for tombs, such a reservation was valid only to the extent that it did not affect the essential of the property; any sale of a fund that was entirely comprised of 'religious places' and dedicated to the dead, was rendered void;¹⁹ in the law of immoveable property, it was not permissible to try to protect funerary gardens from seizure by creditors by stipulating that they could not be mortgaged;²⁰ in tax law, the fiscal authorities granted immunity to the sepulchre itself, but not to its sumptuary annexes, namely, the porticos or gardens that were fraudulently passed off as religious places;²¹ in the law of funeral expenses, citizens were asked to make provision for the sepulchres of deceased persons whose relatives had been unable to fulfil their duty in time, and in return they were given an action for reimbursement of the funeral expenses, based on the fiction of a contract made with the dead person and a debt exigible against their estate.²² However, the sums expended had to be both useful and proportionate to the social status of the deceased. The cases recognise that the preparation of the body, the use of ointments, the carrying of the body, its cremation, the purchase of a plot for the tomb, a sarcophagus, were all necessary expenses, but no reimbursement could be claimed for the construction of adjacent edifices or porticos. The tomb was strictly defined as the space actually occupied by the deceased.²³

¹⁸ Philip, C.J. 3, 44, 9. Despite the stipulations of inalienability which were applied to the gardens and cenotaph of Alexandria (see J. Bingen, *Supplementum Epigraphicum Graecum* XVIII no. 646; de Visscher, *Le droit des tombeaux romains*, at p. 197) the decision of the judge distinguishes quite clearly between the tomb itself and its sumptuary annexes.

¹⁹ Ulpian, *D.* 18, 1, 22.

²⁰ Hadrian, *Gnomon BGU*, V, 1, no. 1210 (FIRA I no. 99) § 2 on the right of seizure of creditors; on conditions against seizure, see the inscriptions in the Graeco-Roman Museum of Alexandria, Inv. no. 26 528 (P.M. Frazer and B. Nicholas (eds.), *JRS* (1958), pp. 117–29, l. 5), the commentary of the same authors in *JRS* (1962), and that of de Visscher, *Le droit des tombeaux romains*, at pp. 197–224); see also *CIL* VI, 3554; 13203; *D.* 31, 88, 5.

²¹ Edict of Trajan, *Gnomon*, § 1, with respect to gardens and other annexes.

²² Ulpian, 10 ed., *D.* 11, 7, *de religiosis et sumptibus funerum et ut funus ducere liceat*, 1.

²³ Hadrian, *ap.* Macer, *D.* 11, 7, 37, 1.

Because of the exceptional status accorded to *res religiosae* (the things of religious law), which implied a right of inviolability enforceable against all persons, and a status of inalienability that could even prevent seizure by a creditor or by the fiscal authorities, it was necessary for the law to confine or circumscribe them by means of fixed criteria. The rule that ensured this was, quite simply, the requirement that the deceased should in fact be present in the tomb. Everything turned on the question of contact and contiguity. The principle was that only that part of the soil in which the deceased was actually buried could benefit from a prohibition against profanation,²⁴ and only this particular part was excluded from market transactions. In order to define the areas excluded from confiscation, Trajan drew a clear distinction between tombs proper (*ta men mnēmata*), which were part and parcel of the sepulchre (*tous taphous*), and the various installations and (especially) gardens which surrounded them.²⁵ With reference to the question of taxation, and specifically inheritance tax, Hadrian defined the tomb as whatever was ‘constructed to protect the place where a body was laid’.²⁶ A third-century commentary on the issue of funeral expenses makes the same point in more precise terms: ‘a tomb is the place where the body or bones of a man are buried’. This commentary in turn refers to a yet more precise definition given by the lawyer Celsus: ‘the place accorded to the tomb is not religious in its entirety, but only to the extent that a body is inhumed within it’.²⁷ Each of these definitions emphasises that it was the body that constituted the tomb.

This arose from the importation into the civil law of inheritance of the old principle of pontifical law which held that a tomb was not completely established until the deceased had been committed to the ground, whether by being buried entire (*humatus*)²⁸ or by the spreading of earth over a bone, usually a finger-bone taken from the body before cremation (*in ossa iniecta gleba*).²⁹ Well before the time of the Digest, the pontiffs had established that only a sepulchre which had been covered

²⁴ Ulpian 25 ed. D. 47, 12, de sepulchro violato, 3, 2. ²⁵ Gnomon § 1.

²⁶ Macer, libro primo ad legem vicensimam hereditarium D. 11, 7, 37.

²⁷ Ulpian 25 ad edictum D. 11, 7, 2, 5.

²⁸ Varro, de lingua latina 5, 23; Virgil, Aen. 9, 215–16; Celsus, ap. Ulpian 25 ad edictum.

²⁹ Varro, de lingua latina 5, 23; Cicero, Leg. 2, 57; Festus, pp. 17–18 L.; for urns on the Appian Way at San Cesario, see CIL VI, 8211. On the practice of *os resectum* or *exceptum*, see F. Allara, *Le traitement du cadavre et la tombe dans l'Occident romain du II^e siècle avant notre ère au II^e siècle de notre ère (sources littéraires)*, doctoral thesis, EHESS (Paris, 1994), p. 160.

with earth was worthy of being called a *sepulchrum*, and of benefiting from religious rights (*iura religiosa*).³⁰ However, although pontifical law also required a number of rituals (such as rituals of purification, or the sacrifice of a sow) for the effective constitution³¹ of a sepulchre, the civil law was satisfied with the presence of the body in the earth, and made no reference to the requirements of pontifical law: 'a plot of land acquires religious status by virtue of our will to bury a deceased person in a plot of which we are the owners', wrote Gaius in about AD 160.³² This simple act was immediately and automatically effective, even if none of the circumstances which gave it its social or moral meaning were present, such as, for example, the acceptance of the office of heir: 'even before he accepts the inheritance, the testamentary heir makes the plot a religious place by the simple fact of burying the deceased in it'.³³ In this way, the law simplified, rationalised, and rendered autonomous the criteria which defined a *locus religiosus*, closely confining it to the area of the sepulchre. A necessary condition became a sufficient condition. The act of burial gave birth to the tomb, and the sinking of the sepulchre constituted the *locus religiosus*. This fact alone impressed the place with a funerary status that rendered it inviolable, inalienable, and immune from seizure. Presented in this way, the rule might seem quite trivial. However, it was something more than an expression of the fact that a tomb usually contained remains. Much more significant is the principle that the legal quality of this *res* depended on its contact and contiguity with the body that it contained. This insistence on a real entity, and, what is more, a corporeal entity, might seem surprising in a legal world in which the order of things was rarely determined by their concrete nature, things being divine or human, public or private, heritable or non-heritable, or even corporeal or incorporeal, not in their nature but by convention. Although incorporeal things were defined as those things which could be neither seen nor touched, possession, which seems to be the very acme of tangibility, was considered to be incorporeal, whereas *dominium*, which existed only in law, was

³⁰ Cic., *Leg.* 2, 57; cf. Verrius Flaccus *ap.* Festus, p. 348 and 350 L.; Marcianus, *D.* 11, 7, 39; Servius *Aen.* VI, v. 510.

³¹ On these rituals, see J. Scheid, '*Contraria facere*: renversements et déplacements dans les rites funéraires' (1984) *Archeologia e storia antica* 117–39; on their role in founding a *locus religiosus*, see Cicero, *Leg.* 2, 57.

³² Gaius 2, 6–7; cf. Marcianus, *D.* 1, 8, 6, 4. In his exposition of the law of tombs, Cicero emphasises that pontifical law and civil law had different objects (*Leg.* II, 58).

³³ See Ulpian, *D.* 11, 7, 4.

not. Similarly, servitudes and obligations were classed as incorporeal things, but powers and capacities were not.³⁴ As regards the things of divine law, which were sub-divided into the religious and the sacred, the former, that is sepulchres, had to contain a real presence, whereas the latter, temples, required only a procedural form. In order for something to become sacred, it was sufficient to consecrate it to a divinity in which one might well have believed, but which could just as well have been invented for the purpose, given that any idea or any invocation would do.³⁵ The sacred was the supreme seat of personified abstractions and incorporeal ideas, whereas it was quite impossible to found religious things on an idea, a memory, or a representation of a deceased.

The fact that *res religiosae*, the things of religious law, could not exist without some material substance had one important consequence: bodily remains could neither be represented by a sign nor replaced by a symbol. This proscription of representation or symbolisation reveals the full significance of the requirement that the body of the deceased should actually be present. Roman lawyers distinguished what they were doing from the more idealistic or abstract tradition that they attributed to the Greeks. The pretext for this attribution was the Greek word *kenotaphion*, meaning 'empty tomb'. For the Roman lawyers, an empty tomb could not be called a *sepulchrum*, which was the Latin equivalent of *taphios*. For them, this sort of container without contents would have been only a 'monument' or *monumentum*, meaning something like a memorial (*un lieu de mémoire*). This much is clear from the following passage of a didactic work of the second century:

Monument in its generic sense means something revealed and transmitted to posterity in memory [*monumentum generaliter res est memoriae causa in posterum prodita*]: it becomes a tomb when it encloses a body or the remains of a body [*in qua si corpus vel reliquiae inferuntur, fiet sepulchrum*];

³⁴ On the incorporeality of possession, see Aelius Gallus, *ap. Festus*, p. 260 L.; no inventory of *res incorporales* includes *dominium* (whereas the *usucapio* which conferred *dominium* is included, see Cic. *Top.* 27). The absence of powers from the list of incorporeal things might be explained by the idea that unlike servitudes, usufructuary rights, debts, or rights of succession, they were not inheritance goods. Nevertheless, wardship, which was a form of power, was incorporeal, as were *gens* and *agnation* (Cic. *Top.* 27, 29).

³⁵ See E. Bickermann, 'Consecratio' in *Le culte des souverains dans l'Empire romain*, Entretiens Fond. Hardt, IX (Geneva, 1973), and F. Dupont, *Le corps des dieux: le temps de la réflexion* (Paris, 1986), p. 234.

but if it contains no such thing, it is built only to preserve a memory, and is what the Greeks call a cenotaph [*erit monumentum memoriae causa factum, quod Graeci kinotaphion appellant*].³⁶

In the same vein, Ulpian distinguishes the *sepulchrum*, in which the body or bones of a dead person are buried, from the *monumentum*, which exists only to preserve their memory (*memoriae servanda gratia*).³⁷ Memory could manage with emptiness, but a tomb could not.

This clarification is all the more significant given that in everyday language *monumentum* was usually understood to mean something like a real tomb. Indeed, many inscriptions described the edifice upon which they were written as, alternatively, 'the monument or the tomb' (*monumentum sive sepulchrum*), the object undoubtedly being to distinguish the phases which preceded and followed the burial of the deceased, the phrase itself being equivalent to those formulae which indicated that the monument had been ordered before the sepulchre.³⁸ On the other hand, the general, non-technical, meaning of *monumentum* is invoked by the tens of thousands of inscriptions which do not make the distinction: *hoc monumentum* (with a clause specifying that it was barred to heirs, or to the heirs of the heir, or, on the contrary, that it was open to them, or even open only to them, and so on . . .). More important, social practices usually associated memory with tombs. In epitaphs from the imperial period, nothing was more common than a dedication to the *memoria* or the *memoria aeterna* of the deceased, so much so that *memoria* came to mean the tomb itself, as in the sign *M(e)M(oriam) F(ecit)*, or even *M(emoriam) F(ecit)*, which was interchangeable with *M(onumentum) F(ecit)*. This was the form of memory that was preserved by perpetual foundations. It was also that which was displayed in sumptuary sepulchral complexes which celebrated the triumph of memory over time. Consider, for example, the *cella memoriae* which were commissioned for the vast sepulchral complex of a member of the Lingon family at the beginning of the second century,³⁹ or, of course, the wondrous tomb commissioned by Trimalcio, which had at its centre a clock that was designed to show passers-by that the passage of time was incapable of effacing the inscription of his name in stone.⁴⁰

³⁶ Florentinus, 7 *Institutionum*, D. 11, 7, 42. ³⁷ Ulpian. 25 ed. D. 11, 7, 2, 6.

³⁸ *Monumentum sive sepulchrum*: Kaser, 'Zum römischen Grabrecht' at p. 31; on dedication *sub ascia* see P. Veyne.

³⁹ G. Drioux, *Les Lingons: textes et inscriptions antiques* (Paris, 1934) no. 34.

⁴⁰ Petronius, *Sat.* 71, 11.

In this sense *monumenta* were ordinarily conceived and understood as 'signs' – as signs of memory – following the model of the Greek *mnèmeion*.⁴¹ But this idealised representation corresponded to representations, values, and objectives other than those of which the law gives precise evidence. In the orthodox learning of the pontiffs and the lawyers, the point was precisely that a tomb could not be reduced to sign; it could not be understood in terms of the Greeks' *sèma*, because in this case the sign contained its own referent. Of course, cenotaphs were familiar in western Rome. For example, in 45 BC Cicero built a sanctuary for the divine glory of his daughter Tullia.⁴² In AD 14, the ashes of Augustus were enclosed in his dynastic tomb, but *heroa* were erected more or less everywhere in Rome and the municipalities, as evidence of his divinisation.⁴³ A great general, especially if he was of princely birth, would be brought back to Rome in great pomp and ceremony, but would also have been honoured by a funeral monument in the province in which he had served with distinction. Such was the case of Tiberius' brother, Drusus, to whom the senate granted an 'honorary tomb' in Gaul, using an official formula which in Latin did not suggest the impossible concept of an empty tomb, which is how Cassius Dio translates it.⁴⁴ In some circumstances, less distinguished soldiers might be honoured in this way. The funeral dedication of a centurion who fell during the rout of Varus in Germany expressed the hope that his bones might be brought to his tomb at some later time.⁴⁵ A deceased who was buried outside his own city would also have been given a monument inside the city, it being made clear that his true sepulchre was elsewhere.⁴⁶ Only in the Hellenistic literature does one eventually find the paradoxical figure of the 'empty tomb' (*tumulus inanis*). In the *Aeneid*, Andromachus dedicates such a tomb to the gods of Hector, Aeneas

⁴¹ Hence Isidore's etymology: '*eo quod mentem moneat ad defuncti memoriam, . . . monumenta itaque et memoriae pro mentis admonitione dictae*', which uses a mode representation which was common in the Roman world (see for example CIL XII, 3619, Arles: *hoc monumentum mausoleumque monimentorum causa paratum*). See also H. Lavagne, 'Le tombeau, mémoire du mort' in F. Hinard (ed.), *Le mort, les morts et l'au delà dans le monde romain* (Caen, 1987).

⁴² Cic. Att. 12, 35. ⁴³ Dio 56, 46, 3.

⁴⁴ Suetonius, *Claudius* 1, Dio 55, 2, 3, *kenotaphion*.

⁴⁵ ILS 2244; see *Answohlkatalog des Rheinisches Landesmuseums* (Bonn, 1963), p. 34.

⁴⁶ See, e.g., CIL II, 379: *D. M. M. Iul. Serano in itinere ur(bano) defuncto et sepulto; Coelia Romula mater filio piissimo et collegium salutare f(aciendum) c(uraverunt)*; VIII, 15930: *D.M.M. Antonius, D. f(ilius), Turbo Roma defunctus, in mausoleo suo sepultus at Vaticanum*.

dedicates another to the gods of Deiphobe, and a third to Palinurus.⁴⁷ One jurist of the third century did indeed believe that these references in Virgil confirmed the religious nature of such an edifice, but another lawyer had previously invoked an explicit rescript by Marcus Aurelius and Lucius Verus which had the opposite meaning.⁴⁸

In Rome funeral images were conceived to be an integral part of the body. Florence Dupont has shown how the Latin *imago* differed from the Greek icon: it was not at all metaphorical, but was bound to the body by a metonymic relation of part to whole. *Imagines* were originally waxen masks made from imprints, forms that were entirely contiguous to the faces from which they were taken,⁴⁹ so that the initial form and its destination were separated by an infinite series of equivalences with no depreciation, much like the relation between a seal and its imprint.⁵⁰ It should be noted that the meaning of the term *forma* was entirely consistent with this. Form also implies a process of placing in contact, in which the convex and the concave compose a singular unity of object and concept.⁵¹ It is clear that in such a culture funerals of an image would not have been considered contrary to the stipulation of pontifical and civil law that a real body be present. The ritual was addressed not to the representation of an absent body but to its visible trace, its external envelope. Pontifical law prescribed that earth should be thrown either on the corpse or 'the body of the absent person'. The expression *absentium corpora* is peculiar. It does not mean that the body was absent, but rather that what was present was indeed the body of an absent person: as though this body had become its double. Therefore, the object of funerals of an image was not a *simulacrum*, but, in a manoeuvre that seems strange to us, the absence of the deceased was conjugated with the presence of his body, a procedure that is entirely incompatible with any

⁴⁷ Aen. III, v. 304 (cf. Servius *ad loc.*: *ad tumulum id est cenotaphion*); VI, v. 325, 505.; VI, v. 380.

⁴⁸ Marcianus, 3 *institutionum* D. 1, 8, 6, 5: '*Cenotaphium quoque magis placet locum esse religiosum, sicut testis in ea re est Vergilius*'; Ulpian, 25 *ad edictum*, eod. loc. 7: 'but the divine brothers have issued a rescript stating the contrary'; the rescript itself is found at D. 11, 7, 6, 1: 'So long as a monument is pure, it can neither be sold nor given as a gift; if it is a cenotaph, it can also be sold, because a rescript by the divine brothers establishes that it is not religious'.

⁴⁹ See F. Dupont, *Le corps des dieux: le temps de la réflexion* (Paris, 1986), pp. 231–52, and pp. 167–72.

⁵⁰ F. Dupont, *Le corps des dieux*, at p. 242.

⁵¹ D. Conso, *Forma*, doctoral thesis (Paris, 1994).

notion of symbolisation or representation.⁵² The same pontifical law recognised two modes of burial: legal (*legitima*) burial, which applied to the body itself, and ‘imaginal’ (*imaginaria*) burial, which applied to an *imago*. The essential distinction is not between body and image, but between an empty tomb (*sepultura inanis*) and a full tomb (*sepultura plena*). A full tomb, that is to say a genuine sepulchre, could contain either a body or a wax moulding.⁵³

THE BODY IN ITS ENTIRETY

The remains upon which a sepulchre was built were necessarily those of a whole body, or what remained once a whole body had been reduced by cremation or burial, even though in exceptional cases what was buried might have been the body’s image. A single tomb might well accommodate a number of dead persons, there being a number of sepulchres and several bodies juxtaposed or mingled in a single family, a corporation, or even single funerary body, if the ashes from many pyres were gathered together.⁵⁴ On the other hand, a single body could not be divided between several tombs nor could it confer a religious status on a number of different places. In the time of Severus, this rule was forcefully stated by the jurist Paul:

A body that is buried in various places does not constitute those places as *loci religiosi*, because a single deceased cannot create a number of tombs: according to me, the true *locus religiosus* is the place where the principal part is buried, that is to say the head, from which an image is taken.⁵⁵

The Roman anthropology of the body is entirely summarised in this response: the body is an entity that guarantees the head, from which the impress used to make the *imagines* was taken. Cases concerning severed heads were occasions to declare expressly a principle of integrity that was presupposed by law: the lawyers envisaged the burial or cremation of a man, a deceased, or a body, in their entirety. Expressions such as ‘the body or its remains’, or ‘the body and its bones’, referred to an undivided entity. *Reliquiae*, *ossa*, and *cineres* were the remains of a

⁵² Servius, Aen. VI, 366. ⁵³ Servius, Aen. VI, 325.

⁵⁴ For the latter proposition, see the example of the mixing of two bodies into a single pile of ashes given in *Carmina Latina Epigraphica* no. 2167. Those killed in battle were often burned on a single pyre: see Livy 27, 2, 9; cf. the image of a single pyre for those conquered at Pharsalus, Lucan, *Phars.* VII, v. 804–5.

⁵⁵ See Paul 3 *quaestionum*, D. 11, 7, 44.

whole body, not of one its parts. The legal texts and inscriptions show that remains, bones, or ashes were taken to stand for the body as a single entity.⁵⁶ From this perspective, one might say that the law gave normative form to a principle which was, according to the historiographical and literary sources, a constant practice in the pre-Christian Roman world: a religious place could be established only if it held either an entire body, or the head, the part which represented the whole. Whenever they wished to deprive their enemies or victims of a tomb, Roman 'head hunters' carried the spirit of vengeance to its extreme by amputating the head from the body, thereby removing its principal element (*son chef*), its unifying principle.⁵⁷ When the decapitated body of Pertinax was discovered in a corner of the Palace, the burial of the body had to await the return of the head, which was being paraded through the city.⁵⁸ This was the same Pertinax who, in AD 210, had allowed relatives of the victims of Commodus to exhume the decapitated remains of their kin: they had then to match heads to trunks before burying them in family tombs.⁵⁹ This fact is consistent with Ulpian's observation concerning the corpses of those who had been condemned to death: it was customary to return to relatives the '*corpora*' of those who had been decapitated and the 'ashes and bones' of those who had been burned at the stake.⁶⁰

BODY AND CORPSE

It is significant that whatever was actually placed in the earth, whether corpse, bones, or ashes, was quite commonly called a 'body'. Indeed, even before burial, remains were recognised as bodies rather than corpses,⁶¹ notably on the field of battle where the objective was to grant the body a tomb.⁶² Bodies, not corpses, were carried back to camp or to Rome,⁶³ or cremated or buried in whatever place they happened to

⁵⁶ For these references, see, respectively: *D.* 11, 7, 37; *D.* 11, 7, 2; *D.* 47, 12, 7; *D.* 11, 7, 42; *CIL* VI, 6502; *CIL* IX, 2052; *CIL* III, 6384; *CIL* X, 5429; *D.* 11, 7, 44.

⁵⁷ On this question, see the essential study by J.L. Voisin, 'Les Romains, chasseurs de têtes' in *Du châtement dans la cité: supplices corporels et peine de mort dans le monde antique* (Ecole Française de Rome, Rome, 1984, pp. 241–93).

⁵⁸ SHA, *Helvius Pertinax* 14, 8–9. ⁵⁹ Dio 73, 5. ⁶⁰ *D.* 48, 24, 1.

⁶¹ There are numerous references in F. Allara, *Le traitement du cadavre*, at p. 49 *et seq.*

⁶² See Livy 22, 7, 5; 27, 28, 1. On the soldiers' practice of carrying a tablet engraved with their name, see Justin, *Hist. Phil.* 3, 5, 11.

⁶³ Livy 3, 43, 6; 8, 39, 14; Cornelius Nepos, *Pausanias* 4, 5, 5. Suetonius, *Aug.* 100, on the return of Augustus' remains to Rome; Tac., *An.* 3, 5, 1, on the return of the

be, even though what was actually discovered in such cases was first and foremost a corpse, restored to the status of a body by the funeral ceremony that was accorded to it.⁶⁴ What was interred was always a body, this theme being consistent with the fundamental rule of funeral law that the legal integrity of the tomb was guaranteed by integrity of the body.⁶⁵ The statutes relating to tombs, including their various amendments, make no reference to corpses, acknowledging only bodies (in addition to bones and ashes).⁶⁶ Inscriptions quite commonly refer to bodily remains as 'ashes', 'collected ashes' (*favillae*), 'bones', or 'body'. It might be thought that these formulations refer to the two rites of burial and cremation, both of which were recognised by the Roman world from the second century BC to third century AD. Occasionally in an inscription the deceased person himself would recall his transition from body to ashes, or would state that the collected handful of ashes contained both his own and those of a cherished companion who had shared his funeral pyre, or that his body as it lay in the sarcophagus was now but bones.⁶⁷ Similarly, any allusion to the act of gathering ashes (*componere cineres*) obviously suggests that the body had been cremated.⁶⁸ Each of these situations could be provided for the founder, by means of an exhaustive enumeration which revealed the various kinds of remains that could be placed in a tomb: *corpus aut ossa aut cineres*.⁶⁹ But these formulae do not necessarily give a precise account of actual funeral practices. The terms used to identify the deceased

remains of Drusus the Elder, etc. In these contexts, Greek historians of Rome used the term *soma*, and never *nekron*: hence, Dio 54, 28, 3 (Agrippa); 55, 12, 1 (Lucius and Gaius Caesar); 56, 31, 2 and 34, 1 (Augustus; cf. Suetonius, *Aug.* 100, *corpus*).

⁶⁴ Having been gathered up and cremated by Cordus, Pompey's body was restored to the condition of a body (*Phars.* 6, 626), although it lacked a head, which was later added to the remains; in Seneca, *Benef.* 5, 20, 4, a body lying in the desert became a body as soon as it was buried.

⁶⁵ There are a number of literary references in F. Allara, *Le traitement du cadavre*, at p. 56 *et seq.*

⁶⁶ See, e.g., CIL VI, 10240: *locum ponendi corporis*; XII, 389: *in hoc monumento corpus inferri licebit*; 20863: *corporibus tralatis*; IX, 984: *in quem induxi sarcophagum, in quem receptus (sic) fuerit corpus meum*; III, 15016: *avorum suorum corpora*, etc.

⁶⁷ CIL IX 2042, Bénévent: *reliquit in cineres corpus*; CIL IX 5140: *hi duo conventi uno lectui compositi una favilla iacent*; CIL III, 6384: *fletus vestros prima favilla bibit/corpus habet cineres*; CIL IX, 984, Compsae: *sarcophagum in quem dum receptus fuerit corpus meum, numquam ullo liceat accedere neque aperire neque vexare ossa mea*.

⁶⁸ CIL VI, 6502; IX, 5140.

⁶⁹ There were various possible forms: Ostia, CIL XIV, 166: *neque corpus neque ossa*; for all the forms, see Rome, CIL VI 22915: *aligenum corpus aut ossa aut cineres*; cf. the

were not necessarily a function of the rites to which they corresponded. 'Body', 'bones', 'ashes', were only metonymic modes of expression. On occasion, an urn might contain a body, or a sarcophagus ashes, so that the 'ashes' were a body, and the 'body' the ashes recovered from the funeral pyre. Similarly, clauses excluding strangers from the tomb usually referred to bodies, there being no indication as to whether these were bones, ashes, or corpses.⁷⁰ The term 'bones' was just as abstract, and could refer as much to the remains of cremation as to what was left of a body that had decomposed in a sarcophagus or in the earth. Therefore, epitaphs drawing the attention of passers-by to the presence of a body, bones, or ashes, should not be taken literally. They referred not to the condition of the deceased at the moment of burial, and certainly not to their present condition (and, as we shall see, they did not invoke their probable state, that of a corpse). They simply made use of the commonplace terms for deceased persons. Bodies, bones, and ashes – vestiges accompanied by a hollow name⁷¹ – were just the expressions commonly used to indicate the presence of human remains whose precise form was unknown. Similarly, the asyndetic phrase *corpus ossave*, which was common in legal texts, did not imply a descriptive analysis. It simply referred to the remains of the deceased, which were euphemistically referred to as the bodily entity which guaranteed the very existence of the tomb.⁷²

This representation located the body at the opposite extreme from the corpse. Bodies, not corpses, were buried in religious places, whether or not those bodies had been reduced to ashes. In relation to the tomb, a body figured as a *cadaver* only when its presence was forbidden. This designation had less to do with the physical condition of the body than with the ritual or legal circumstances which warranted that it be described as such. Hence, although the deceased person who was exposed to view in the course of a funeral ceremony was indeed a body, in the eyes of the Pontifex Maximus, who was forbidden to see it, the

inscription of a will from Gaul copied on to a folio which is in the museum of Basel (tenth century), *FIRA* III no. 49, in which the prohibition on introducing the body of a stranger enumerated all the possible modes of cremation, burial, or deposit of either a body or its remains: I, l. 20–1: *combustus sepultusve confossusve conditusve consitusve*; and II, l. 1–3: *combustus soffossusve*.

⁷⁰ See, e.g., Rome, *CIL* VI, 13152; 10284; 27627; for Dalmatia, see *CIL* III, 15016.

⁷¹ Thus *CIL* IX 2042: *nomen nudum vanumque reliquit in cineres corpus*; *CIL* VI, 12087: *corpus habet tellus et saxum nomen inane*; *CIL* III, 3247: *terra tenet corpus, nomen lapis*.

⁷² Ulpian, *D.* 11, 7, 2, 5; *D.* 11, 7, 8; *D.* 47, 12, 11.

body became a corpse. In 12 BC, Augustus, in delivering the funeral eulogy for Agrippa, had to ensure that the *nekron* was veiled, and he had to do the same thing the following year for the funeral of his sister Octavia. In AD 14, Tiberius, who was then a pontiff, had to seek absolution for the act of touching the corpse of Augustus, and in AD 23, when he had become Pontifex Maximus, he had to have a veil placed before the 'corpse' of his son Drusus, whose eulogy he pronounced.⁷³ Therefore, the designation of the deceased as a 'corpse' was based not on some sort of natural necessity, but was closely associated with specific ritual and legal contexts. In particular, the texts use the term corpse for those bodies which had no tomb. A gloss by pseudo-Servius says so quite explicitly: 'we call them corpses because they lack a tomb'. Similarly, Isidore observes that a body 'is a corpse when it lies without a tomb . . . to entomb is to bury a body'.⁷⁴ It is not particularly significant that the etymologies drawn up to support these definitions are so obviously wrong when they derive corpse from the verb *cadere* (to fall), which was supposed to connote either bodies thrown into a ditch, or limp bodies, which collapse of their own accord when they are left without support, or from *careo*, meaning to lack (a tomb).⁷⁵ What is essential is the distinction between 'corpses', which lack a tomb, and 'bodies' which were placed in the earth, which were treated in accordance with the rules of pontifical law, and which had the capacity to confer a civil law status upon the ground in which they were buried. A close study of the literary sources has shown that this distinction was generally observed by Latin authors of the classical period.⁷⁶ *Cadavera* were left to their fate, excluded from any kind of ritual and any kind of legal organisation: they were neither reduced to ashes on a pyre, nor reduced to bones beneath a tombstone, and, above all, they were never inscribed in a religious place.

⁷³ On the prohibitions which applied to pontiffs see Servius, *Aen.* 6, 176, and, more generally J. Scheid, *Le délit religieux* (Rome, 1981), p. 135. On the eulogies delivered by Augustus and Tiberius and the presence of the 'body', *corpus* or *soma*, whose character as a corpse is hidden from them, see Dio 54, 28, 3; 35, 4; Seneca, *Consolatio ad Marciam* 15, 3 (cf. A. Fraschetti, *Rome et le Prince* (Paris, 1994), p. 300). On the absolution of Tiberius after he had touched and accompanied the body of Augustus, see Dio 56, 31, 3.

⁷⁴ Ps. Servius, *Aen.* 11, 143; Isidore, *Ety.* XI, 2, 34–5; cf. Cyprian, *Epist.* 40, 1.

⁷⁵ Isidore, *Ety.* XI, 2, 34–5: *cadaver a cadendo, quia iam stare non potest*; Ps. Servius, *Aen.* 11, 143: *sive proici iubebantur, a cadendo, sive quod sepultura carebant cadavera dicta*.

⁷⁶ F. Allara, *Le traitement du cadavre*, at p. 66.

Certainly, in pagan literature of the classical period, the corpse had not yet become the object of a general reflection on life and death, or on the corruption of the flesh and the body, themes which were quite obsessively developed by certain religious fathers of the fourth and fifth centuries.⁷⁷ The only representation that was consistent with a sepulchre was that of a body already reduced *ad ossa*, fixed in the condition of durable remains. Only in those exceptional and irregular cases in which the deceased had no tomb were there references to the transformation of the body outside the tomb. In such cases, writers evoked the stench of the body, the processes of putrefaction and liquefaction, the horror of bones slipping free of tendons to which they were only loosely attached, or to the desiccation of the marrow, these being symptoms not of death itself but of an abandoned body, left without a tomb.⁷⁸ Only in these criminal circumstances were corpses seen to give themselves their own fate, autonomously, as it were, gradually reaching the condition of being *ad ossa*.⁷⁹ And these representations of a process which religious and legal norms ensured to be systematically obscured in the tomb occupied only a marginal position, at some remove from the tomb and the funerary institution, abandoned to nature and to a time that was uninstituted (*un temps non maîtrisé*).⁸⁰

As soon as it was placed in the earth, and whatever its real state of decomposition and putrefaction (assuming, of course, that it had not been incinerated), the body of the deceased was supposed to have been already reduced to its ultimate state of bones or ashes, and in referring to it as such the epitaphs merely anticipate the changes worked by time, which necessarily precede this ultimate reduction. This passage or transition is never suggested by funeral inscriptions, and certainly not by the legal texts. If this fiction that the body was immediately reduced to a fixed form is linked to the rule of pontifical and civil law that the integrity of the tomb (which was itself an immutable entity) depended on the integrity of the body that it contained, it becomes clear that the impression of permanence that was produced by Roman sepulchral law, by means of its norms of inviolability, inalienability, and

⁷⁷ See, e.g., M. Mathieu, 'Horreur du cadavre et philosophie dans le monde romain: le cas de la patristique grecque au IV^e siècle' in F. Hinard (ed.), *La mort, les morts et l'au delà dans le monde romain* (Caen, 1987), pp. 311–20.

⁷⁸ Hence Varro, *L.L.* 5, 25 (cf. Lucretius, *nat. . rer.* 6, 1154–5); Lucretius 3, 173; Lucan, *Phars.* II, v. 166, VI, v. 88 and v. 538. See also Ovid, *Ibis*, v. 330–8 and Petronius, *Sat.* 134.

⁷⁹ *Phars.* VII, vv. 811 and 841. ⁸⁰ *Phars.* II, 166 and Petronius, *Sat.* 115.

imprescriptibility, was attached to the figure of a bodily entity which was immune to the degradations of time. This mode fashioned a correspondence between the imperative of totality, which characterised the Roman model of the *corpus*, understood as a physical or social entity, and the imperative of perpetuity, which was effected by the institution of the *sepulchrum*. For our purposes, the essential point is that a scheme concerning time, an institution that was developed under the rubric of perpetuity – namely, the perpetual funerary designation of certain places and certain goods – was wrapped around the ultimate residue of a corporeal thing. Therefore, the Roman law of tombs invites one to reflect on the articulation of time and corporeality, and in particular the conjoining of an abstract institutional order (the permanent grant of those goods that were included in the legal category of *res religiosa*) and the presence of a concrete body.

THE VIOLATION OF THE TOMB (*VIOLATIO SEPULCRI*)

The entombed body should be seen as an essential guarantor of the permanence of the tomb. The law constructed a proprietary regime, that regime was founded on the tomb, and tombs in turn required the presence of remains. It is important to emphasise the highly material or concrete nature of what was apprehended through the institutional order of *res religiosae*, which dealt only with objects, materials, and remains. Places and things to which imprescriptible status was attributed were attached to the ashes and bones of the dead, to their corporeal remains – *reliquiae* – rather than to their memory or their name. In contemporary terms, these would be foundations or trusts. The jurisprudence relating to the violation of tombs elaborated the basic principle that it was the tomb, rather than the body it contained, that benefited from religious status. The designation *res religiosae* applied to the tomb, the superstructure built upon it, and the ground which supported it. Nowhere is it argued, or even suggested, that this designation could be applied to the remains themselves, even though their presence was essential to the legal status of the tomb. The rules promulgated by praetorian edict focused on the container without mentioning its contents: ‘Against whosoever is accused of having wrongfully violated a tomb, I shall grant a legal action by means of a formula setting out the facts’.⁸¹ The exegesis

⁸¹ Ulpian, 25 *ed. D.* 47, 12, 3.

and commentary on this rule, and the imperial legislation to which they later gave rise, made no reference to bodies, but encompassed everything that was built around them, and which, as certain texts put it, furnished the place.⁸² To violate a tomb was to infringe upon the things dedicated to a religious cult of the dead.⁸³ In some extreme cases tombs were used as dwellings.⁸⁴ Usually, however, the violation consisted in an alteration to the monument, which was defined as anything built above the religious place – the place of the tomb – and into the air above it, according to the principle that ownership of the ground carried with it ownership of upper levels. Were one to refer to the commentaries and laws to draw up an inventory of the constituent elements of the tomb as an inviolable space, it would soon become clear that what was at issue was simply the alteration or removal of the stones and marbles used to construct the tomb, of statues and columns, or of ornaments wrenched from the tomb and used in the construction of other edifices.⁸⁵ Occasionally, it could go as far as the theft of ossuaries, the ultimate recipients of the *reliquiae*.⁸⁶ But the *reliquiae* themselves are never mentioned. The very thing that was essential to constitution of *res religiosae* is absent from this inventory of what counted as *res religiosae*: namely, the bodily remains of the deceased.

Although sepulchral clauses might threaten fines or invoke all sorts of curses against kin or strangers who went so far as to open the sarcophagus and disturb the bones it contained,⁸⁷ no legal provision included the profanation of bodies among the acts that might be prosecuted as

⁸² Hadrian, *ap. D.* 11, 7, 37, 1. ⁸³ Gordian, *C.J.* 9, 19, 1, a. 240.

⁸⁴ Lenel, *Edictum Perpetuum* (3rd edn), § 92 p. 228 = Ulpian, *D.* 47, 10, 3. On the use of tombs as dwelling places, see *D.* 47, 10, 3, 6 and 11; *Sententia Pauli* I, 21, 12; cf. Lucan, *Phars.* VI, v. 512.

⁸⁵ See Cicero, *Phil.* 9, 14. In the imperial edict referred to in an inscription from the Froehner collection in Paris, called the Nazareth inscription and dated somewhere between Augustus and the middle of the first century AD (F. Cumont (1930) 163 *Revue Historique* 241; F. de Visscher (1953), *RIDA* 285; L. Robert (1954) *Bulletin Epigraphique* 248), the founder of a tomb recalls the prohibition against knocking tombs over, or displacing its stones and columns. cf. Ulpian, 18 *ed. D.* 47, 12, 2. See *Sentent. Pauli* I, 21, 5 on the violation of a tomb to remove an object. See Constantine, *C.J.* 9, 19, 2 on the incorporation of pieces taken from a tomb into a town or country house, and Constantine, *C.J.* 9, 19, at 2, a. 340, a. 349, 3, a. 356, and 4, a. 356. See also Julian, *C. Th.* 9, 17, 5, a. 360.

⁸⁶ Celsus, *ap. Ulp.* *D.* 47, 12, 2.

⁸⁷ These provisions ensured that a tomb was reserved for the use of a family or even a single person (G. Giorgi, *Le multe sepolcrali* (Bologne, 1910); de Visscher, *Le droit des tombeaux romains*, at p. 112 *et seq.*; A. Rossi, 'Ricerche sulle multe sepolcrali romane'

a *violatio sepulchri*. In fact, the body was protected only indirectly, by means of a 'thing' that both contained it and substituted for it. This was true also of bodies awaiting their tomb. Before and after being placed in the tomb, bodies were never protected directly or as such. The law ensured only that the funeral would take place without disruption, guaranteeing the relay between the vulnerable body and the sanctified place that it guaranteed. It was in precisely these terms that a law against public violence introduced by Augustus condemned the various methods used to obstruct funeral rites. However, the law did not prohibit violence against the deceased 'in person': the various offences listed by the *lex Iulia de vi* do not include the mutilation of corpses or the dismantling of bodies, despite the fact that such excesses were among the most widely condemned of the forms of civil violence which existed in Rome from the time of the proscriptions and the wars between rival factions. The law did not refer to offences against the bodies of deceased persons, but only to disruptions of the rite of burial, the *funus* which was concluded by interment of the body: the text says simply 'preventing the burial of the deceased, disrupting and interrupting the funeral'.⁸⁸ A third-century commentator clarifies the link between this crime and the profanation of a sepulchre. The offence defined by the *lex Iulia*, that of threatening the existence of a sepulchre, is related to the *violatio sepulchri*, which attacks the tomb itself: 'The *lex Iulia* on public violence is associated with the crime of violating a sepulchre, as regards the part of that law aimed at those who obstruct the funeral or the burial of a deceased. For he who violates a tomb thereby prevents the deceased from being buried in it'. The analogy was based on the injury done to the tomb rather than the profaning of the corpse.⁸⁹

The same principle informed an edict by which Septimius Severus authorised the transfer of the deceased from a provisional resting place to their final home. This presupposed that in exceptional cases remains

(1975) *Riv. Stor. dell' Ant.* 111). Usually, they made no allusion to the prohibition against touching the deceased themselves; they prohibited the intrusion of any foreign body (there are numerous examples in *FIRA* III, no. 83) by invoking the terminology of *violatio sepulchri* (see, e.g., *CIL* III, 2632; VI, 17319; 24799; XIV, 1153; 1972, etc.). However, some clauses referred to disturbing or profaning the bones themselves, as in *CIL* VI 36467 = *ILS* 8184 and *CIL* IX 9845 = *ILS* 8237.

⁸⁸ Marcianus, *D.* 48, 6, 5 pr.

⁸⁹ Macer, *D.* 47, 12, 8; cf. de Visscher, *Le droit des tombeaux romains*, p. 153, according to whom this text is evidence that the *lex Iulia* included a crime of harming a body by exhuming it. See also Ulpian, *lib. 9 de omnibus tribunalibus*, *D.* 11, 7, 38.

might be exhumed, but beyond that it presupposed that the transfer should not be obstructed by some violent act: 'The edict of Severus the divine provides that bodies that have not yet been delivered to their perpetual sepulchre can be transported. It is forbidden to detain or mistreat bodies, or to prevent them from being transported through the territory of cities'.⁹⁰ This is also how one might understand the frequently invoked prohibition against the theft or concealment of corpses, a practice that is usually attributed to religious belief, whether the long-standing tradition of necromancy or the later cult of relics, which was targeted by laws of the second half of the fourth century.⁹¹ But corpses could have more prosaic uses, as is suggested by the fact that Augustus' law against public violence joined a prohibition against the disruption of funerals with one against the use of threats to force recognition of a debt.⁹² A law of the late imperial period offers a glimpse of the issue. Creditors, real or pretended, appropriated the bodies of the deceased so as to compel their heirs to admit liability and grant a security. Indeed, bodies were sometimes seized, or threatened with seizure, as liens at the very gates of their tomb.⁹³ Clearly, this was not the profanation of a body but the disruption of the process of burial. To steal a body was to prevent its burial, which was why that offence was usually prosecuted under Augustus' law.⁹⁴ A rescript of Septimius Severus which covered the provinces banned the theft of corpses, especially when it was perpetrated by armed bands.⁹⁵

By extension, violence directed against the tomb also included violence directed not against the deceased themselves but against the funeral cortege bearing them to the pyre or to the grave. It is important to note the essential continuity of the transition from death to funeral, and from funeral to tomb. The funeral was a procession that could not be disrupted, and the sepulchre was a place made inviolable in perpetuity. Penal law and praetorian edict thereby complemented one another

⁹⁰ D. 47, 12, 3, 4. ⁹¹ C. Th. IX, 17, 4, a. 353; IX, 7, 5, a. 363 and IX, 17, 7, a. 386.

⁹² D. 48, 7, 5 pr. ⁹³ See Justin to Theodotus, a. 526, C.J. 9, 19, 6.

⁹⁴ In the *Sententiae Pauli*, V, 26, 3, *funus diripere* becomes *funus eripere*, which means that *funus* should be understood in the sense of body, while retaining its ritual meaning, because the question was also one of *funus turbare*: '*funerari sepelirive aliquem prohibuerit, funusve eripuerit, turbaverit* (where the funeral or burial of a deceased had been impeded, or where a body had been stolen or a funeral disrupted)'. In the version of the *lex Iulia* given by Marcianus in the Digest nothing prevents us from translating *funus* as 'body', as in the expression *funus diripere distrahere*, which accordingly refers to the theft of a body.

⁹⁵ Septimius Severus, *ap.* Ulpian, D. 47, 12, 3, 7.

by organising a transitory process and a permanent state. They ensured the continuity of the transition from death to tomb, from one body (*corpus*) to another, in order to avoid any disruption that might extinguish the institutional order. Once buried (*humatus*) the body became one with the tomb, which was thereby constituted as a religious place, so effectively that what was rendered inviolable from that moment on was the space that received this designation rather than the *reliquiae* that it contained. It is important to emphasise once more that the founding of a *locus religiosus* depended upon the inscription of a corporeal thing, and, more especially, that supremely corporeal thing that was the body ('*ce corporel par excellence qu'est le corps*'). It will be recalled that this was the condition that distinguished the religious from the sacred, the latter being quite consistent with emptiness. A sacred place was simply a place that had been consecrated. This required nothing more than a verbal dedication to a god who may well have been invented expressly for the occasion; that is, a speech act sufficed to create a god, transfer property, and preserve the property from commodification. Religious status, by contrast, was built on the body. For pontifical law, this was a necessary condition, and for the civil law it was a necessary and sufficient condition. How, then, was the question of exhumation addressed?

EXHUMATION AS THE SUPPRESSION OF A LOCUS RELIGIOSUS

Many texts suggest that upon being exhumed a body immediately became a corpse. This belief was deeply lodged in Roman culture.⁹⁶ It was most clearly expressed in the fourth century in legislation aimed at the exhumation of martyrs, a practice that was vigorously denounced on the basis that it allowed the places inhabited by the living to be invaded by corpses. Buildings were polluted by the use of stones taken from occupied tombs, the eyes of men were polluted by the sight of exhumed corpses being transported before large crowds, and the world itself was nothing more than an accumulation of corpses, skulls, and

⁹⁶ In the tradition of Roman culture, whatever was placed in the tomb was a body, and whatever was removed was a corpse (Ovid, *Ibis* v. 166–8; Lucan, *Phars.* 6, v. 531–2; Pliny, *N.H.* 7, 187, *eruto C. Mari cadavere*). When in 473 or 474 Sidonius Apollinaris visited an abandoned cemetery in Gaul, which was strewn with bones, he saw only fragments of *insepulti*: *Ep.* 3, 2, 1.

bones gathered from their sepulchres.⁹⁷ Yet, what is important here is not the horror of corpses or of the pollution they generated, these themes being quite fully discussed in histories of Roman religion. In the register of the institution, which should be distinguished from the order of beliefs, the exhumation of bodies and their transformation into corpses had the immediate effect of extinguishing a religious place by removing its essential condition of existence. The sepulchre took the place of the body, but only on condition that the body remained attached to it. Once exhumed, the body no longer served as the guarantee that was essential to the existence of a tomb. A tomb that had been violated to the point of being emptied lost its status as a *res religiosus*. That was why removal of a body from the tomb was not treated as a *violatio sepulchri*: the tomb no longer had anything to protect. This fact is evidenced by the regime of licences for the restoration of funeral monuments, which were granted subject to the condition that the body was left undisturbed: 'The deterioration of a tomb is prohibited, but it is permissible to repair a damaged and ruined monument, so long as the body is left untouched'.⁹⁸ This sort of disturbance would entail exposing the bones so that the 'body' lapsed into the condition of a 'corpse' – an impure corpse, but one that was quite unable to maintain the religious status of the tomb. To penetrate the heart of the tomb would not be to restore it, but to destroy it.

Some municipal charters imposed upon magistrates a duty to remove any bodies that had been illegally interred in their town, but at the same time it required that they perform an expiation.⁹⁹ One might say that this was because of the pollution caused by the corpses that had been so brusquely uprooted. But it was above all because this act had of itself deactivated and destroyed a *locus religiosus*. Although sepulchres were generally prohibited in urban areas, they might nevertheless

⁹⁷ See Constantius II, *C.Th.* 9, 19, 4, a. 357; Julian, *C. Th.* 9, 17, 5, a. 363; Mark the Deacon, *Life of Porphyry*, 25; Eunapios of Sardes 472, cited by P. Brown, *Le culte des saints* (Paris, 1984), p. 19.

⁹⁸ Marcianus, 3 *inst.*, *D.* 47, 12, 7. On the repair of tombs, which had to be authorised by the pontiffs, presumably because the situation was materially similar to a *violatio sepulchri*, see *D.* 11, 8, 5, 1; *CIL* VI, 2963 = *ILS* 8382; *CIL* 10, 9259 = *ILS* 8381; on their embellishment, see *D.* 11, 8, 1, 6.

⁹⁹ *Lex Coloniae Genetivae*, cap. 73 (for an interpretation of this text, see S.P.C. Tromp, *De Romanorum piaculis* (Leiden, 1921), p. 83, and J. Scheid, *Le délit religieux*, at p. 136). By contrast, other municipal laws authorised burial in this situation, cf. *D.* 47, 12, 3, 5.

constitute *loci religiosi* so long as they did not infringe upon the rights of the owner of the land.¹⁰⁰ The situation was different only if they were founded in a public place, in which case they did not give rise to any *ius sepulchri*, and a body could be evicted from a 'pure', which is to say non-religious, place without there being any requirement for a *piaculum*.¹⁰¹ The jurisprudence concerning the movement of a body from one place to another, which is referred to above (in the context of an edict made by Septimius Severus) confirms this distinction. When a deceased person was buried temporarily, while a proper sepulchre was built, this provisional resting place remained profane because it was not a perpetual sepulchre, and when the prince or pontiff gave permission to exhume the body, no expiatory sacrifice was required.¹⁰² Nor was one required when a land-owner asked for a body buried without permission to be removed from his land. Because the ground had not become *religiosus*, there was no need to impose a *piaculum*.¹⁰³

Therefore, the exhumation of a body was not prohibited in those exceptional cases where its presence had not conferred 'religious' status on the ground, whether that land was privately or publicly owned.

¹⁰⁰ Although burial in land belonging to another did not make the plot a *locus religiosus*, burials in town, despite the penalties imposed, were never expressly declared invalid: *XII Tab.* X, 1 = *Cic. Leg.* II, 23, 58; *senatus-consult* and the law of 260 BC, *Servius, Aen.* XI, 206; *Lex coloniae Genetivae* cap. 73; Hadrian, *D.* 47, 12, 3, 5 (where the public expropriation of land shows that the question concerned deceased persons buried on their own land); Diocletian, *C.J.* III, 44, 12, a. 292; *Sententiae Pauli* 1, 21, 3. On the tradition that private individuals were the first to bury the dead in their homes see *Servius, Aen.* V, 64, and *Isidore, Or.* 15, 11, 1.

¹⁰¹ See *Cic. Leg.* 58, on the destruction by the pontiffs of tombs found in a public place; cf. the fragment of a municipal charter of the time of Augustus, *CIL* I, 2, 498.

¹⁰² See *CIL* VI 2120 = *ILS* 8380, where the pontiffs, without imposing any obligation to perform a rite of expiation, authorised the removal of bodies temporarily deposited in a sarcophagus to a tomb that was subsequently built on the via Flaminia. cf. *D.* 47, 12, 3, 4 (n. 101 above), cf. *Marcus Aurelius and Lucius Verus, D.* 11, 7, 39 and *Paul, D.* 11, 7, 40; Diocletian, *C.J.* 3, 44, 10, a. 287. On *sepultura perpetua* as a description of a tomb that had the status of a *locus religiosus* see, e.g., *D.* 47, 12, 3, 4; *Sententiae Pauli.* 21, 1, 1; *C.J.* 3, 44, 10, a. 287.

¹⁰³ *Labeo, ap. Ulp.* 25 ed. *D.* 11, 7, 8 pr (on the intervention of the prince in relation to the mode in which bodies were transported, compare *ILS* 1593; 1685; 8380; *C.J.* 3, 44, 14; Kaser, 'Zum römisches Grabrecht' at p. 27, n. 49). Burial in the property of another without consent does not make a place *religiosus* (cf. de Visscher, *Le droit des tombeaux romains*, at p. 63). The texts are clear on this point. See *Trebatius and Labeo, ap. D.* 10, 3, 6, 6; *Gaius* II, 6; *Marcianus, D.* 1, 8, 6, 4; *Ulpian, D.* 10, 3, 6, 6 and *D.* 11, 7, 2, 7; *Paul, D.* 11, 7, 34, and *Caracalla, a.* 223.

And expiation was not a consequence of the exhumation as such. More precisely, it was the penalty for a religious wrong that consisted in obliterating a sepulchre by emptying it of its substance. That is why, when a town was purged of its dead, the expiatory sacrifice was imposed only where their burial had created a genuine *sepulchrum*. More generally, it seems clear that the same sacrifice was required where a body was transferred from one *sepulchrum* to another. In an inscription made in AD 117, the pontiffs imposed a *piaculum* where they gave permission to transport *reliquiae*; the transfer took place on 2 February, the death having occurred on 12 August of the previous year.¹⁰⁴

The jurisprudence of fictions offers some interesting clarifications. When a head that had been buried in one location was subsequently removed to another, where it was reunited with the trunk of the body, was it necessary to perform a rite of expiation? It will be recalled that the jurist Paul held that only a head (*caput*) could found a tomb. Having stated the principle, he then considers the case of a request (*impetrare*) to transfer *reliquiae*, which, if carried out, would extinguish the *locus religiosus*.¹⁰⁵ He could only have been referring to the transfer of a head. The law had to give a clear and rational answer to this macabre question, and had to do so by elaborating its own institutional forms (*montages*), which were autonomous from the external data which they replaced (whether natural, anthropological, or social). We are invited to imagine the scene following some act of butchery, after which a wife, a son, or a brother were granted the consolation of a *feri placet* by the pontiffs, on condition that they expiated the religious offence which their piety had led them to commit. In law, the question was abstracted from the reality of the dismembered body, from impurity or mourning, and transposed to the dimension of a *locus religiosus*.

The impurity of corpses and the pollution caused by contact with them was not the governing principle of pontifical and legal order. In reality, the law sanctified tombs rather than the dead. It envisaged the harming of the latter only indirectly, through the violation of their sepulchre. *Violatio sepulchri* concerned only objects – materials, stones, ornaments. From this perspective, to exhume the body was to put the tomb itself to death. The crime of violating a sepulchre was aimed at

¹⁰⁴ CIL VI 1884 = FIRA III no. 85 e; cf. P. S. 1, 21, 1. cf. *Sententiae Pauli* 1, 21, 1, *sollemnibus redditis sacrificiis*. On the difficulties in applying pontifical law to analogous cases in the provinces, see Pliny, *ep.* 10, 68, 69.

¹⁰⁵ Paul, 3 *quaestionum*, D. 11, 7, 44.

any separation of the body from its tomb, any interval between the body, which would be returned to the condition of a corpse, and the tomb, which would thereupon become profane and marketable. The exhumation of bodies and their transformation into corpses sufficed to effect this separation. Although this resulted in the pollution of the living, pontifical law, praetorian edicts, law and jurisprudence, were not based on the distinction between pure and impure. They were concerned only that tombs might lose that which constituted them as tombs, for to empty a tomb of its contents was to extinguish a *res religiosae*. Throughout, the law was concerned with a 'thing'. The deceased was not protected directly, but only to the extent that its presence founded the religious vocation of a place. Laws were concerned only to prevent those forms of violence which might prevent the deceased from being replaced by a tomb, as well as those which threatened the perpetuity of the locus which their presence constituted as a *locus religiosus*.

These observations confirm that the body was not a *res religiosa*, although without a body there could be no *locus religiosus*. Above all, they confirm that the *reliquiae* inscribed in the heart of the sepulchral arrangement (*dispositif*) were not the prime focus of sepulchral prohibitions. An imperial edict from the time of Augustus (or AD 70 at the latest) did indeed prohibit the exhumation of the dead and their transfer to other locations, but it did so only in consideration of the 'perpetual immutability' of tombs, the preservation of which was declared to be one of the principal objectives of the legislation (*taphous tumbousté . . . toutous mēnein ametakeinetous ton aiova*).¹⁰⁶ Similarly Marcus Aurelius and Lucius Verus were not directly concerned with offences to the dead, but sought only to regulate their removal from a temporary resting place to their tomb, or from one to the other, in accordance with traditional policies of pontifical law.¹⁰⁷ As for Septimius Severus' rescript addressed to armed attacks on corpses, the issue was not exhumation but violence that occurred before the body was placed in the tomb. It was not until the turn of the fourth century that the profanation of bodies was prosecuted and punished as such. A passage from Paul's *Sententiae* attests

¹⁰⁶ See the inscription published by F. Cumont, 'Un rescrit impérial sur la violation de sépulture' (1930) 163 *Revue Historique* 241 (and on this text, see de Visscher, *Le droit des tombeaux*, at p. 161). See also L. Robert (1954) *Bulletin Epigraphique* 248 and A. D'Ors, 'Epigrafía Jurídica griega y romana' (1954) *SDHI* 480, (1957) *SDHI* 538, and (1960) *SDHI* 523.

¹⁰⁷ *D.* 11, 7, 39.

this change in attitudes. For the first time the sources hold that a corpse is protected independently of the status of the tomb.¹⁰⁸ Transposed to the sphere of criminal law, the obligation to perform a *piaculum* was no longer linked to the abolition of a religious place or the extinguishing of a *perpetua sepultura*. The body, rather than the tomb, became the focus of attention. It was the body that was directly harmed and hence directly protected.

In the period around AD 300, horror at the exhumation of corpses was expressed without reference to the protection of tombs as such. This reprobation was similar to that displayed in the second half of the century by Emperor Constantius II. The religious status of the tomb endured, but it was supplemented by rules aimed at prohibiting the profanation of bodies themselves, any violence done to them being no longer something distinct from the notion of *violatio sepulchri*:

Those who violate tombs, which are, so to speak, the dwellings of the deceased, commit a double offence. Their act of destruction despoils the deceased who are buried and in later building with the materials they pollute the living. If a person removes the stones, marbles, columns, or other materials from a tomb, either to build with them or to sell them, he shall be required to pay ten gold pounds to the fiscal authorities. This penalty is an addition to the old punishments: it does not alter or diminish the penalty imposed on those who violate tombs. This penalty shall be imposed on those who have stolen buried corpses or remains.¹⁰⁹

Here, one might recall Julian's letter to the people of Antioch, which is referred to above. And one might also refer to a constitution of 386: 'a body that has already been buried shall not be transferred to another location. No person shall divide martyrs into pieces, and no one shall sell those pieces'.¹¹⁰

¹⁰⁸ S.P. 1, 21, 4. ¹⁰⁹ C. Th. IX, 17, 4 = C.J. 9, 19, 4, a. 357.

¹¹⁰ Gratian, Valentinian, and Theodotus, C. Th. IX, 17, 7, 26 February 386. I may be stretching the meaning of *martyrem distrahere*, but I think it alludes to a practice of dismemberment that is clearly evidenced in the fourth century: see Basil, *Hom. in sanctos XL martyres*, 8, PG XXXI, col. 522; Gregory of Nyssa, *Hom. in XL sanctos martyres*, PG XLVI col. 783; Vitricius of Rouen, *De laude sanctorum*, PL XX, col. 448; Sozomen, *Hist. eccl.* III, 14, for the Christian sources. On the theft of bodies and relics in late antiquity, see N. Mascard, *Les reliques des saints: formation coutumière d'un droit* (Paris, 1975), p. 15 et seq. For an earlier period, see R.L. Fox, *Païens et Chrétiens: la religion et la vie religieuse dans l'empire romain de la mort de Commode au Concile de Nicée* (Toulouse, 1997), pp. 461 and 555.

This clarification, which comes from a later era, sheds some light on the structures and concerns of the traditional, orthodox, pontifical, and civil Roman law as it related to sepulchral prohibitions. The body was evoked only as the condition of the legal order of things and goods which it marked with its presence. Prohibitions were attached to the periphery of the system.

RES RELIGIOSAE

The law thereby sanctuarised the tomb rather than the deceased. It protected a thing which in turn contained another thing. A status of inviolability was attached not to the contents but to the container, not to the relics but to their shield. This concentric structure was based on an eminently practical consideration. The moral rampart of the prohibition was only secure if it reached beyond the thing itself to circumscribe its ramparts. In the most concrete and material sense, the law protected that which protected. This approach has some relevance to a study of prohibitions in general. The institutional form was based on the prohibition of access to a thing through which one gained access to another thing. It barred access not to the thing itself but to its container. The gods themselves were defended by a perimeter drawn by the objects and places that were consecrated to them. Sacrilege consisted in nothing other than the theft or transgression of these objects or places. And the Romans conceived of the prohibition that affected the soil of their city in much the same way: a town founded on legal principles (*urbs iusta*) was protected by the inviolability of its perimeter, which had the status of a 'sacred thing' (*res sancta*). Prohibitions attached to objects: the temples of the gods, the tombs of the dead, and the perimeters of the city. These things enjoyed a particular status of inviolability and inalienability, which designated them as, respectively, sacred, religious, and holy. From this perspective, the law of inviolability was the template. The three essential categories of religion – the sacred, the religious, and the holy – were objectified as three different statuses of objects. In this way, the law instituted the spatial extension of a limit that could not be transgressed. A prohibition was spatialised in such a way as to make it perceptible, which implied according it the legal status of a thing.

It may be that insufficient attention has been paid to the significance, and the various implications, of the confinement of religion within

a constrained enclosure. The law was concerned only with objects of which the remains of the deceased were a constitutive element. Even if it were to be restricted to a study of the religion of the dead, an anthropological study of Roman *religio* would undoubtedly open up a much broader domain than that which was produced by the law's cold and precise organisation of things. When it was not restrained by legal technique, religion was everywhere: in affects, mentalities, social practices, and culture. In it, one sees a sort of obsessive anxiety about falterings or collapses, and it articulated a concern to deploy ritual artifices so as to defuse the hidden dangers which threaten human action. The ritual procedures of *religio* neutralised the terror inspired by a condition of latent transgression and danger. Ritual staged a precaution, an anxious hesitancy in the face of the dangers that might result from a failure to observe the strict procedures: the careful scruples of *religio* were opposed to negligence, which was its exact opposite – *religio/neglegere*.¹¹¹ By contrast, legal technique distilled this set of affects and practices into a precisely defined space, namely, the confines of the *sepulchrum*. The law made no reference to the imaginary domains which, in the eyes of the living, the dead seemed to occupy; instead it granted them only a space defined by function: distinctive of a particular category of property, a space which was carved out of the legal classification of things. Property dedicated to the dead (*res religiosas*) that is, the places in which tombs were like other things of divine law in that they were inviolable and perpetually from commerce. But, unlike property dedicated to the gods, which belonged to the public sphere and which was managed by the city, property reserved for the dead was established in the sphere of private estates.¹¹²

For scholars interested in the beliefs which grew up around death and the deceased, the legal texts might initially seem somewhat disappointing. The rules of funerary law, and the commentaries built upon them, disclose only a world of objects, a world of things. These were concerned not with the dead as such, but with their tombs, or the structures built over them. Moreover, these objects were not treated as signs, or as symbols of something else. There is in the texts no trace of some belief,

¹¹¹ C. Koch, *Religio* (1960), p. 100; the works of J. Scheid are an essential reference on the question of ritual. See especially his *Le délit religieux dans la cité antique* (Rome, 1981), pp. 117–71, and *Romulus et ses frères* (Rome, 1990), p. 751.

¹¹² de Visscher, *Le droit des tombeaux romains*, at p. 60; Kaser, 'Zum römischen Grabrecht', at p. 75.

metaphysics, or idealisation relating to the world of the deceased. Nor is there any trace of the ideas which the ancients held about death and the deceased, of their representations of the afterlife, or even of the fears and sentiments that moved them during their experiences of mourning. Quite simply, legal practitioners had to establish in rigorous terms the criteria defining these 'things', because they were governed by a specific legal regime. And this regime, despite its name, holds no message concerning the religion of the dead. The religion of the dead was something quite distinct from the status of the objects that were dedicated to them. This status was defined at the prosaic level of legal commerce and management. What was important was the ability to specify the category of property to which tombs belonged, whether they could be alienated or sold, and in what forms and upon what terms and conditions they might eventually be put to use. The religion of the dead enlisted rites and, ultimately, beliefs (although we now know that beliefs about the world of the dead, which have for so long fascinated historians of religion, were not at all necessary to that form of precise ritual observance which underlay the idea and practice of religion in Rome). But law's mode of organisation was not concerned with religion in the sense of a social practice or a mental representation. It was concerned only with institutional regimes which preserved certain places in a fixed condition by means of proprietary rights and servitudes, or by means of rules of inalienability. It is important to emphasise a fact that is quite often misunderstood; namely, that in the Roman world the category of religion was rationalised in such a way as to facilitate the development of rules which were ultimately concerned with the disposition of worldly goods, with ownership and exchange. In law, any reference to the dead (who were in this respect analogous to the gods) was made only so as to establish the institutional limits of a zone in respect of which market transactions were prohibited.

One might say that in that sense the tomb was not pure, or *purus*. But it was not impure because it was polluted by the bodies it contained. The 'profane' or the 'pure' were not immediate and intuitive observations of religious consciousness, no more than were the 'sacred', the 'religious', or the 'holy', which were strictly defined institutional categories. They were all precise legal constructions, with well defined frontiers. The law designated a plot as *purus* not because it was free of the polluting presence of some corpse, but because there was no funerary dedication that prevented it from being freely alienated:

So long as a monument is pure, it can be sold or given away. If it is a cenotaph, it must be acknowledged that it can be sold: the divine brothers have decided by rescript that a cenotaph is not religious.¹¹³

It will be recalled that the inscriptions show that founders often annexed the surrounding land to their tombs in order to extend religious status to the land. But the legal decisions qualify these lands as 'pure', which meant that they could be sold despite the wishes of the deceased, which were vainly inscribed in his epitaph and vainly comminatory.¹¹⁴ A municipal charter of the time of Augustus holds that public places in which the dead were buried were 'pure and unbound by any religion'.¹¹⁵ There are many texts, and all point in the same direction. A plot of land that held no tomb, that was free of any funerary dedication, and which the law relating to the deceased had not made inalienable in perpetuity, was classified as 'pure'. These plots or properties belonged to the world of unbridled commerce.¹¹⁶ A terrain became impure in the legal sense of the term when some limitation was imposed by the law of tombs. An 'impurity' of this sort was not pollution, but simply set some obstacle in the way of possession and exchange.

The pure was to the religious as the profane was to the sacred. A 'profane' space was one free of any sacred servitude, upon which the law of the gods had no hold;¹¹⁷ a 'pure' space was one free of any religious servitude. Whether profane or pure, the world was entirely open to human appropriation, both public and private. Quite late in the day, the lawyers invented the term 'the things of human law' to describe this world, a phrase which was not used before the time of Gaius in the second century, and the use of which was properly didactic. By contrast, 'profane' and 'pure' were much older categories, which were used

¹¹³ Ulpian, 25 ed. *D.* 11, 7, 6, 1.

¹¹⁴ *Sententia Senecionis de sepulcris* (n. 5), l, 11. On the formula *ager purus* in epigraphic sepulchral clauses, see, e.g., *ILS* 8343, 8344; in certain inscriptions, *purus* is also applied to tombs reserved for the family or for heirs (see H. Thylander, *Inscriptions du port d'Ostie* (Lund, 1952), A 16, pl. VII).

¹¹⁵ *CIL* I, 2, p. 498.

¹¹⁶ See further Ulpian, *D.* 10, 3, 6, 6; *C.J.* 3, 44, 2, a. 223, *C.J.* 3, 44, 6, a. 224, *C.J.* 3, 44, 9, a. 345, and *Inst. Just.* 2, 1, 9.

¹¹⁷ Plautus, *frag. incert.* 38; Varro, *de ling. lat.* VI, 54; Paul-Fest, p. 257 L.; 296 L.; 298 L.; Macr. *Sat.* 3, 3, 3; Servius auctus, *Aen.* XII, 779; Isid. *Et.* X, 224. See E. Benveniste, 'Hommages à G. Dumézil' (1960) 45 *Latomus* 46; R. Schilling, 'Sacrum et profanum: essai d'interprétation' (1977) 30 *Latomus*.

to categorise whatever was outside the zones devoted to the sacred and the religious. Yet, because there was no general legal term describing the whole set of things which were freely exchangeable, without any limitation of sacred or religious law, there was nothing to prevent one of these categories from being extended beyond its own particular field of application to the whole of the territory left to free commercial exchange between men. Thus, the term 'profane' could mean all that was outside tombs or temples.¹¹⁸ And, albeit more rarely, the term *purus* could be used in the same way. Consider, for example, Ulpian's exegesis of a rule prohibiting the burial of a deceased in land belonging to another, when that land was 'pure': 'The term "pure" refers to a place that is neither sacred, nor holy, nor religious, but which is free of any servitude of those descriptions'.¹¹⁹

This text has sometimes been taken to be an inauthentic gloss, on the basis that it would be difficult to include *res sanctae* (namely, the walls of cities) within the class of things that make up the genus of *res divini iuris* (things of divine law), which are sacred and religious objects such as temples and tombs.¹²⁰ But this is to make too much of the fact that the pedagogical division of the *res divini iuris* does not appear before Gaius in the second century, whereas the classificatory scheme sacred-holy-religious (*sacer-sanctus-religiosus*) appears at the latest at the end of the Republican era, and is in fact the continuation of a much older pontifical tradition.¹²¹ In reality, any difficulty that there might be in subsuming the whole set of things that constituted the triad of temples, tombs, and walls within the single category of *res divini iuris* did not arise until the latter term was invented in the middle of the second century. The fact that one of the three species (*res sanctae*) is incompatible with the genus is just one unfortunate result of the fact that

¹¹⁸ On the category of *profanum* as distinct from the *sacer* or *religiosus*, see Trebatius Testa, lib. 1 *de religionibus*, frg. 2 Bremer, p. 437, Funaioli. On '*profanum id proprie dici ait quod ex religioso vel sacro in hominu usu proprietatemque conversum est*' as the opposite of *religiosum*, see, e.g., Paul, *D.* 11, 7, 40, *C.J.* 3, 44, 4, 4, a. 223 and 3, 44, 9, a. 244; see also Servius auctus. *Aen.* XII, 779.

¹¹⁹ *D.* 11, 7, 2, Ulpian, 25 ed., 4. This is a commentary on the meaning of '*purus*' in the praetorian edict: see *D.* 11, 7, 2, 2, and compare *Sententia Senecionis de sepulcris*, l, 11.

¹²⁰ S. Solazzi, 'Ritorni su Gaio' (1957) 8 *IURA* 1, at p. 9.

¹²¹ Aelius Gallus, *ap.* Fest. s.v. *Religiosus* pp. 348–9 L. See Trebatius Testa, *ap.* Macr. *Sat.* 3, 3, 5 and, more generally, 3, 3, 1, on pontifical decisions. *Res divini iuris*: Gaius *Inst.* 2, 2; Ulp. *D.* 43, 1, 1 pr.

the genus was invented somewhat later; in no sense does it spoil the triadic scheme itself, which is ordered by an entirely different logic. In the pontifical and civil tradition, what was at issue was just the classification of zones of inviolability and inalienability. No reference was made to the category of the divine when forms of sale, drafted in the form recommended by Sabinus, made sacred or religious things (or sacred, religious, and public things) inalienable. The coherence of these institutions was based on practical rather than theological considerations. Similarly, when Ulpian used the word *purus* in praetorian edicts, and explained it in terms of three traditional zones of prohibition, rather than by directly contrasting it with the category of religious things, he did not commit the logical fallacy of referring at once the whole schema of temples, tombs, and walls to the divine. Rather, as lawyers quite commonly do, he simply used an association of ideas in the process of exegesis. For him, the pure, in the sense of that which was not embraced by the category of the sepulchre, simply recalled the two other traditional modalities of the inviolable, inalienable, and imprescriptible, that is, the two other non-pure zones. Thus, resorting to the eminently Roman procedure of treating the part as the whole, he universalised the meaning of a technical term in order to conceive the whole set of things open to legal exchange.

Religious status – just like sacred status – was a status of exception. That is why the law of imperial Rome, in adapting a set of principles inherited from the pontifical tradition, had to develop a thoroughly technical doctrine relating to the law of tombs. If one interleaves texts from those compiled by Justinian (commentaries upon edicts, the opinions of juriconsults, imperial constitutions) with the prolific evidence of funerary epigraphs, in which private individuals provided for the status and destiny of their own tombs by means of comminatory sepulchral clauses, one gets a reasonably clear sense of what ultimately founded a particular kind of permanence, namely, the non-patrimonial status of religious places. An entire legal-temporal apparatus was constructed around these places and the bodies inscribed within them. The structure of funerary foundations, which was of crucial importance in the history of Western institutions, both public and private, ecclesiastical and political, rests on places immobilised by the remains of the dead; but that structure was strictly contained within the limits of these places.

Legal prohibitions relating to death were not the expression of a taboo which applied to dead bodies for substantial reasons, because, for example, they were impure or because they had a sacrosanct status

which rendered them untouchable. It is true that such notions of impurity were very widespread, and gave rise to a number of ritual and religious precepts which required the avoidance of contact and the undertaking of rites of purification. However, this realm of beliefs and mental attitudes was not directly transposed into law; quite the contrary, the law distanced itself from them, and this is something that the historical anthropology of the Roman world should take into account if it is not to lapse into archaicism. The categories of religious anthropology, and especially the distinction between pure and impure, are not the best way into the most durable and the most historically adaptable form of intelligence produced by the Roman world – namely, its law. Indeed, these categories are overlooked, so that anthropology is deprived of an object with which it is still unfamiliar: the cold rationality of legal institutions, the instrument of society's permanent acculturation of itself. In Rome, law and legal rules were not the expression of such taboos. Rather, they were the instruments by which taboos were transformed into a set of techniques for the management of inheritance funds. Attention was focused on the *res* comprised in religious status, within which the religious cult of the dead had been converted into a regime of property law, and in particular into a concern for the body as a subject of the law of things, and for purity as a legal and economic category. Roman law was a powerful tool for the management of death in the domain of inheritance transactions; or, in other words, for moving from religion into an entirely different realm.

CHAPTER THREE

SCIENTIFIC OBJECTS AND LEGAL OBJECTIVITY

Bruno Latour

PORTRAIT OF THE CONSEIL D'ETAT AS A LABORATORY

'Those are the facts, like it or not'; 'we have reached our decision, whether it pleases you or not': the solidity of facts and the rigour of the law both have a kind of hardness which compels assent. What makes a comparison between the world of science and that of law all the more interesting is that both domains emphasise the virtues of a disinterested and unprejudiced approach, based on distance and precision, and in both domains participants speak esoteric languages and reason in carefully cultivated styles. Also, both scientists and judges seem to attract a kind of respect that is unknown in other human activities. The comparison I shall try to make in this chapter is not so much between 'science' and 'law' as it is between two laboratories, that of my friend Jean Rossier at the Ecole de Physique-Chimie, and that of the Conseil d'Etat.¹

Translated by Alain Pottage.

¹ This chapter is a revised version of chapter 5 of a much longer ethnography *La fabrique du droit: une ethnographie du Conseil d'Etat* (La Découverte, Paris, 2002). The Conseil plays the role of judge in respect of administrative law – this is called the *Contentieux* – and also the role of legal advisor for the gouvernement – this is called, rather enigmatically, *Sections administratives*. It is part of the executive not the legislative branch. In its judicial function, it deals with all the relations between the State and the individual. For a comparison with British law, see Carol Harlow, "La huronne au Palais-Royal" or a Naive Perspective on Administrative Law' (2000) 27(2) *Journal of Law and Society* 322 and the much older full book treatment in Charles E. Freedman, *The Conseil d'Etat in Modern France* (Columbia University Press, New York, 1961).

Rather than base my comparison on what scientists and lawyers say about themselves, I shall, as has become my habit, rely on the results of ethnographic enquiries, close attention to places, forms of life, conditions of speech, and to all those minor details which together, little by little, by minor brushstrokes, allow one to redefine science and law. In developing this approach, we shall see that epistemology has adopted a number of the features of its elder sister, justice, and that the law often clothes itself in powers that only science can provide. Far from confirming established clichés, a systematic comparison of practices allows us to make a more differentiated portrait by distinguishing scientific objects from legal objects. Perhaps the anthropologist of science, having spent so much time hanging around in laboratories, will find in the Conseil d'Etat those celebrated virtues of objectivity that he sought in vain in the laboratory.

The Conseil d'Etat is not a public place, but while the court is in session the public is admitted to certain areas at certain times. Ushers and receptionists police the otherwise invisible distinction between those places which are open to the public and those (rather more numerous) places which are reserved for the work of the *conseillers*, for their offices, and for the absolutely secret process of deliberation. Here, at the Ecole de Physique-Chimie, no area is really a public place, but, once one has been granted admission by one of the neuroscientists, no area is out of bounds.² In each building, there is an entirely different distribution of space: anyone can attend the hearings of the Conseil, but only at certain times, in certain seats, and restricted areas; beyond that, no outsider has access to the work of the law – only trainees, government commissioners with the appropriate credentials, or a somewhat nosy ethnographer. The laboratories of my friend Rossier are open only to scientific personnel, but no area is barred to the authorised visitor. Whereas the presence of a stranger in judicial deliberations would corrupt the nature of the activity and vitiate the judgment on grounds of procedural impropriety, the presence of a visitor in the laboratory might get in the way of the researchers' work, but it would have no influence on the nature of their work on the brains of white mice, into which they have inserted fine glass tubes. The two laboratories therefore have a very different relation between public and private: although 'ignorance of the law is no excuse', the last stages of its flowering remain completely secret;

² Adi Ophir, Steven Shapin *et al.*, 'The Place of Knowledge: The Spatial Setting and its Relation to the Production of Knowledge' (1991) 4(1) *Science in Context* 3.

by contrast, although laboratories are closed to anyone who is not an employee, in principle anyone could understand what goes on inside, which is in no way mysterious: 'we have nothing to hide'.

After many months at the Conseil, the ethology of our friends in the laboratory seems quite astonishing. Here, no one is formally dressed, there are no serious tones of voice, no solemn gait, no refined and smoothly intoned turns of phrase, no elegant conversation; instead, one finds raised voices, incongruous laughter, casual dress in the 'American' style, the occasional outburst, or tirades launched against oscilloscopes which do not describe their phosphorescent curves as they should, against guillotines which are too blunt to lop off the heads of laboratory rats, against micro-pipettes whose incisions do not allow the researcher to probe a neuron held under the microscope, or against some especially obtuse referee. Whereas in the Conseil speech flowed effortlessly from silver-tongued *conseillers*, here it is interrupted, hesitant, embarrassed – sometimes to the point of becoming gibberish. That is not to say that visitors are unable to understand what is being said, but rather that gestures can take the place of words, and that, at numerous points in their discourse, researchers replace speech with a finger pointed at the phenomenon produced by an instrument, a phenomenon that reveals itself only hesitantly because it is dependent on the visibility of an individually isolated neuron, and hence on a technical and scientific prowess that often misfires, and which constantly has to overcome obstacles such as blocked pipettes, inaccessible neurons, or unintelligible results. Whereas the *conseillers* sound like books because they move from the text of Lebon to the text of their *arrêt*, and thence to the text of the memoranda and responses that compose the stratified layer of the file, always remaining within the world of texts, laboratory researchers are forever crossing the deep chasm that separates a rat's neuron, pulsating under a micro-pipette, from the human phrases that are spoken in relation to that neuron.³ It is hardly surprising that they should so often hesitate, begin again, or remain in suspense, dumb for several minutes, or that the homogeneity of their speech acts should be disrupted by

³ The Lebon is the yearly selection of the most important *arrêts* of the Conseil. English-speaking readers have to realise that French administrative law is a *case-based* corpus of law, much like common law, and is entirely different from the *code-based* legal system which deals in France with private and criminal affairs (called *le judiciaire*). France, like many countries invaded by Napoleon, is endowed with two completely different and parallel branches of law. But England was unfortunate in this respect, although the Law Lords fulfil in part the same function as the Conseil.

exclamations such as: 'I've got it!', 'that's it!', 'I've lost it!', or 'stupid thing!'.

The question of homogeneity or heterogeneity between texts and things marks a contrast which would strike even the most inattentive visitor. One can climb from the cellars of the Palais-Royal, in which linear kilometres of archives lie in hibernation, to the attics which house the offices of the *commissaire du gouvernement* and the documentation service, without finding any real difference between the objects that are essential to each branch of the work of the Conseil: files, more files, nothing but files, to which one should add cupboards, tables and chairs (which differ in price, depending on the rank of the employee) varying numbers of books, and, last but not least, a profusion of elastic bands, paper clips, folders, and rubber stamps. Besides the telephones and staplers, all of these tools have an intimate connection with textual matter, and the computer database, which allows the *arrêts* of administrative law to be viewed online, cannot be considered as an instrument. But in the laboratory, no room looks like any other, because the differentiation of space is effected by the distribution of the machines which allow the competences of the physiologist, the neurophysiologist, the molecular biologist, the peptide chemist, the radiographer, and the bio-informatics expert to be co-ordinated in the context of a single experiment. When the *conseillers* meet in debate, they all look like one another, the differences between them being made only in terms of how much experience each has of administrative law: no one voice carries more weight than another (if one overlooks the fine gradations of prestige). When experimenters get together, they might well have no understanding of the instruments, competences, or difficulties of a neighbour with whom they have worked for years, but they know precisely when he or she can take over from their own know-how, and to what extent they can trust this expertise implicitly. Whereas by definition *conseillers* only judge cases of which they have no knowledge, and to which they are being introduced for the first time, using no instruments other than their memory and a few notes, each researcher only deals with that part of a rat's 'file' with which they are perfectly acquainted, thanks to the narrow window opened by an instrument, discipline, or speciality that it will have taken them years to master.

Therefore, the nature of the Conseil does not depend on its equipment, but on the homogeneity of the world of files that are kept, ordered, archived, and processed, and upon the homogeneity of a staff that is renewed, maintained, and disciplined. The Conseil can deal with

a high turnover of cases precisely because its *conseillers* are largely interchangeable, and because there is only a limited division of labour.⁴ The nature of the laboratory is crucially dependent upon the heterogeneity of its equipment, on their rapid renewal, and on the diversity of competences grouped together in one place. Whereas an inventory of the Conseil's furniture and files would yield no explanation of what it actually does, an inventory of the laboratory and its tools, noting their age and cost, their distribution in space, their sensitivity, and the academic qualifications of their operators, would tell you almost anything you wished to know about the nature of the place, 'tell me what your instruments and specialities are, and I'll tell you who you are and where you are placed in the hierarchy of the sciences'. The same comparison can be summarised in the observation that the Conseil costs a lot in terms of brain-power, but almost nothing in terms of equipment other than paper; a laboratory costs a lot in terms of wetware, but even more in terms of equipment and software. If some new Commune were once again to raze the Palais-Royal to the ground, but leave the *conseillers* a complete collection of Lebon, the following day they could render judgment almost exactly as they had done before; if the mob were to chase Rossier from his laboratory and pillage his equipment, he would be unable to say anything at all precise about rats' brains.

Let us pay closer attention to the shared bodily attitudes of the inhabitants of these two places. More often than not, laboratory researchers are found gathered in a concentric circle around an experiment, at the centre of which lies the particular phenomenon which is being submitted to a kind of proof or ordeal (in the present case, the electrical stimulation of a particular neuron, which enables the neurotransmitters expressed by the neuron to be collected at the other end of the axon).⁵ They are constantly talking, somewhat enigmatically, about the stammering being which they have coaxed into a kind of hiccupping speech, or at least which they have coaxed into indicating, by means of oscillations and chemical outputs, what it thinks of the proof to which it has been submitted. They resemble a group of gamblers huddled around a

⁴ One of the many peculiarities of the French judges in administrative law is that they go back and forth between business, active administration, elective function, and their job at the Conseil. Thus at any given moment, about half of the members are actually out of the Conseil.

⁵ Michael Lynch, 'Sacrifice and the Transformation of the Animal Body into a Scientific Object: Laboratory Culture and Ritual Practice in Neuroscience' (1988) 18 *Social Studies of Science* 265.

cockfight on which each has staked his fortune; they may not be shouting or screaming like madmen, but there can be no question that they are *passionately* interested in the fate of their neuron, and in what it might have to say for itself. On the other hand, passion is the least appropriate term to describe the attitude of judges in the course of a hearing. There is no *libido sciendi*. No word is pronounced more loudly than another. Leaning back in their chairs, attentive or asleep, interested or indifferent, the judges always keep themselves *at a distance*. Only the claimant suffers to any degree. Although he is often (but not always) present, he understands no more of what is being said about his case than the rat understands of the clamoured observations made about the structure of its brain. In any event, the passion of the claimant is what is of least interest in the procedure of the case: it does not count; or rather, it no longer counts or does not yet count. Whereas in court judges are entirely unmoved by a case in which only the claimant is passionately engaged, the objects studied in a laboratory do not understand how their judges can be so passionately interested in matters to which they themselves are entirely indifferent. One thing is sure, the *libido judicandi* is very specific.

This marked difference is even found in the writing activities to which scientists also devote themselves, although they spend less time writing than the *conseillers*. As we know very well, instruments, equipment, chemical reagents, or animals are not the end products of laboratory activity. A research team which was content to conduct research of the highest quality, but which never produced a scientific article, would soon lose its reputation, unless it gave up basic research in order to develop industrial applications. In terms of the production of writing, a scientific institution resembles the Conseil d'Etat, and in both cases one could compile a statistical inventory of the number of pages produced by each of the members of the institution, and even of the number of citations of their respective works. However, this resemblance is dispelled as soon as one looks at the nature of scientific articles, which are quite unlike a legal *arrêt*. Researchers write '*continus*' rather than '*arrêts*'; in fact, to borrow a legal term, they produce *claims* in which the author figures more as a claimant than judge. That is, each scientific article functions as a judgment passed on claims made by colleagues, or as a 'plaint' made to those same colleagues on behalf of a phenomenon whose existence is claimed by the article. In other words, the objectors to whom a scientific article is addressed are not true judges because (a) they are of the same professional category as their author; (b) they cannot bring

discussion to an end; (c) they themselves are judged (sometimes very harshly) by the claimant; (d) with whom they share the same rights to extend, re-open, or close the discussion. Whatever the mechanisms which bring a scientific controversy to an end, they are necessarily very different from those which were invented by the Conseil to close cases.⁶

Surprising as it may seem, scientific articles are much more passionate than administrative law texts. That is because they push a claim as far as possible, by throwing everything into the pot in order to meet all possible objections, by ignoring some objections, or by highlighting those objections which allow them to emphasise a particular experiment or result. All of this passion, energy, all of these rhetorical flourishes, which make even the most theoretical or esoteric of scientific articles more beautiful than any opera, are absent from the *arrêts* of the Conseil, which have to reference all of the relevant texts (imagine a scientist being obliged to cite each of the sources he used), to answer each of the arguments invoked (imagine a researcher being forced to avoid none of his referee's objections), and *only* those arguments (imagine how horrified a scientist would be if he were asked to address only those questions asked of him by others rather than the hundreds he has asked of himself), to add as few innovations as possible to the knowledge established by their predecessors (all scientific authors dream of triggering a scientific revolution) and to do all of this in such a way as to close the discussion once and for all (whereas researchers dream only of re-opening the discussion, or, if they are the ones who bring it to an end, to do so in their own terms and to their own advantage).⁷ The point is that researchers write for other researchers whose invisible but constraining presence informs everything they write, whereas judges, above all if they are judges in a court of last instance, write only for the claimant's lawyer, and, secondarily, for their colleagues and the writers of legal doctrine. They have different addressees.

There are, of course, situations in which science assumes the air of the courtroom. One example is given by the celebrated Commissions of the Académie des Sciences which were set up in the nineteenth century to settle (on behalf of scientists) disputes arising between those particularly irascible researchers who were impervious to any of the normal

⁶ Sheila Jasanoff, 'What Judges Should Know About the Sociology of Science' (1992) 32 *Jurimetrics Journal* 345.

⁷ Greg Myers, *Writing Biology: Texts and the Social Construction of Scientific Knowledge* (University of Wisconsin Press, 1990).

means of resolution (short of a duel!). Today, we have juries, public forums, or televised debates in which one researcher in the field of gene therapy is set against another, in the presence of an audience which is supposed to decide between them.⁸ There are also large areas in which scientists cast as experts appear before judges in order to give evidence about matters within their area of expertise (the insanity of the defendant, the source of DNA taken from the scene of the crime, the validity of a patent application, the risks of a particular product, and so on). But each of these situations bears the imprint of law rather than that of science. In the nineteenth century the Académie was able to issue quasi-*arrêts* in respect of scientific controversies only because its authority was almost like that of the law, and because, even then, its decisions were only *quasi*-decisions which were not binding upon anyone, and which could not prevent disputes from resurfacing elsewhere, in other forums or in other laboratories. In science, there is no such thing as 'the authority of the adjudicated case (*res judicata*)'. On the other hand, when an expert gives evidence in court, the judge and the law take all precautions to ensure that what the expert says should be neither a judgment nor a warrant for judgment, but that it should serve only as a form of testimony which does not usurp the role of the judge.⁹ These hybrid situations show quite clearly that each activity, each form of writing, is as different as oil and water, remaining separate even when they have been mixed quite violently.

What should one call the very distinctive grouping of white coats gathered passionately around the ordeal to which some new entity (in this case an isolated neuron that has been made visible as a distinct individual) has been subjected, and which allows the scientists, by means of a chaos of hesitant observations and in a flourishing of partial (in both senses) texts which are published as quickly as possible, to generate claims that are fiercely defended, and which at the same time judge that claims previously published by themselves or by their colleagues are invalid, obscure, false, unfounded, or quite simply banal and uninteresting, all of this having been determined within a domain (laboratory, discipline, literature) that is both jealously guarded and yet open to all, and whose boundaries might be challenged by any outsider? Are they judges deciding claims made by other judges? That would be

⁸ Sheila Jasanoff, *Science at the Bar: Law, Science and Technology in America* (Harvard University Press, Cambridge, MA, 1995).

⁹ This is the famous *Daubert* case, see <http://laws.findlaw.com/us/509/579.html>

unthinkable. Might they then be some kind of gang or mafia? Scientific activity sometimes look suspiciously like these associations, especially in its blend of extreme rigour and complete lawlessness. And yet the answer again has to be 'no', because there is a third party in all disputes, a judge who is mute but who nevertheless determines the issue, to whom all parties agree to defer without discussion (while discussing incessantly!) and of whose role one finds traces in the archaic legal practices of the ordeal and divine judgment: namely, the very objects that are subjected to the ordeal of proof in order that they might say something about that which is said of them – something at once inaudible and conclusive, the celebrated *aita*, *res*, *causa*, thing, or *chose* that the history of science in European languages borrowed from the world of law.¹⁰ In order to understand the very special mode of enunciation that one finds in the core of the laboratory, one has to look to torture, to the history of interrogation, or the subtle arts of the Inquisition; that is, to the very practices that modern law now regards as shameful and archaic and from which it is at once proud and ashamed to have escaped.

'We have ways (*moyens*) of making you talk' might say the physiologist, betraying the trace of sadism which is present in even the most innocent experiments. But the word 'means' (*moyens*)¹¹ does not have the meaning it has in law, because the neuron that is subjected to questioning makes no complaint, formulates no claim, and the process to which it is subjected is not regarded as an offence (except by animal rights activists, who regard laboratory experiments as just as cruel as the ancient ordeals, and therefore worthy of vigorous prosecution before the courts). The non-human which is submitted to the ordeal – the rat, neuron, DNA, or neuropeptide – occupies both the position of a judge of last instance, in the sense that it passes judgment on what is said about it, and that of the plaintiff, because it is represented by an intermediary, the impassioned scientist who has taken on its case, and who contributes article after article to the scientific literature arguing for the recognition of his own right of existence and that of his thing (*chose*), his object (*cause*), and its own particular causality, before a tribunal of judges composed of his own colleagues, who are never in a position to pass final judgment, unless they defer to the uncontestable (but always

¹⁰ Yan Thomas, 'Res, chose et patrimoine (note sur le rapport sujet-objet en droit romain)' (1980) 25 *Archives de philosophie du droit* 413.

¹¹ 'Moyen' in French legal parlance designates an argument which may be articulated in front of a court; *moyens* may 'prosper' or 'dry', 'thrive' or 'bear no fruit'.

contested) evidence of matters of fact, which themselves speak clearly only if scientists have unfolded their properties in a more or less public display that they have collectively agreed to treat as final.

One can see that it is impossible, in depicting the way in which even the most banal experiments stage the scientific ordeal of truth, to base ourselves on the prevailing idea that the sciences are pure, objective, disinterested, distant, cold, and self-assured. It is also impossible to make a direct comparison between science and law, without first describing those aspects in which each bears features that seem to have come from its counterpart. In both practices one finds speech, facts, judgments, authorities, writing, inscriptions, all manner of recordings and archives, reference works, colleagues, and disputes, but their distribution is at once too similar to warrant a distinction between law and fact, and too different for them to be seen as a single function. In order to make sense of this overlap I shall, as ever, proceed cautiously, feeling my way forwards.

For now, the essential point is that the facts, contrary to the old adage, obviously do not 'speak for themselves': to claim that they do would be to overlook scientists, their controversies, their laboratories, their instruments, their articles, and their hesitant, interrupted, and occasionally deictic speech, which is only audible and visible. On the other hand, nothing of what goes on in the laboratories of the *Physique-Chimie* would be comprehensible without noticing what the people in white coats say is constantly being observed, validated, understood, and interrupted, both by the omnipresent speech of even the most distant colleagues, and by those matters of fact whose centrality is acknowledged by all, and to whom all scientists defer as their sole appellate court. To say that scientists simply reach an agreement between themselves as to what the things they are talking about are saying, would be to understand nothing of the peculiar force of their activity, and even less of their motivating passion. Thirdly, the speech that circulates in the laboratory between scientists, their colleagues, and their objects, and in respect of which each is at once judge and party, speaking and mute, audible and inaudible, beginning and end, does not only have the form of a legal action or case; it also has an intimate connection with the question of what things are, or rather what they do to claims that have already been lodged.

Propositions are transformed into a 'case' that can be judged by the peculiar interaction of disciplines: 'if the experiment is properly constructed, says researcher A, we should be able to get object B to

transform the published claim C into medium D, yielding either a better-established certainty or a magnified doubt, at least from the point of view of colleagues from discipline E (as defined by us), to whom we have addressed our latest article F'. Finally, we should notice that this intervention will further enlarge a corpus of documents and claims the future development of which will supply the criteria by which this whole procedure will be either validated or invalidated. Impassioned scientists, having promoted their object as much as possible in their articles, leave it to history, to the court of history, and thus to future scientists, to judge whether they were right or wrong in making a particular assumption. Strangely, as we shall see, judges – real judges – cannot place their faith in this Last Judgment of History. However slow or tardy they might be, they simply do not have the time to let others decide for them.

HOW TO PRODUCE DETACHMENT

Let us return to the Right Bank, cross the courtyard of the Louvre, and return to the Palais-Royal, with its ornamental gold and marble, its grand staircase, its historical paintings, and its republican frescoes. After his stay in the laboratory, the ethnographer finds himself both more at ease and much more awkward. Amidst the men in white coats, he stood, arms dangling helplessly, not knowing quite what to do with himself, finding himself obliged to take notes in all sorts of uncomfortable postures, just as distanced from the researchers he was studying as the latter were from their headless rats. Nevertheless, he could at least talk to his scientific colleagues, with whom he shared a wish to know; now and then he could ask for explanations, even suggest hypotheses, and his own stammers hardly seemed out of place in the concert of hesitations, reprises, exclamations, and surprises which accompanied the spectacle of proof and demonstration. He too could point to the phenomena in question, cloaking them in the fragile web of his metaphors, allusions, and approximations. He was, of course, clumsy and incompetent. But having agreed to stand aside a little to let him see the performance they had staged and which they were describing, his colleagues the researchers allowed him to share their passion and even, on occasion, grasped his own false, naïve, or badly formulated ideas, because even a child could speak aptly in the face of the phenomena undergoing interrogation. Back in the Conseil, the observer takes his invisible place

without ruining the uniformity of the courtroom; he is seated writing at a table amidst people who have seated themselves at the same table to write. Yet he is no more their colleague than he is their companion at dinner. Not only do they not share his *libido sciendi*, but even the interested observer has to remain as dumb as a carp, incapable of uttering any well-turned phrases, valid judgments, or plausible hypotheses. He could of course stammer something or other, but the whole point is that the judges do not stammer: the moment he opened his mouth it would become obvious that he was not a member of this group.

We have left behind the amiable confusion of the laboratory, with its scattered journals, boxes of samples, its dripping pipes, purring centrifuges, overflowing dustbins, its raised voices, and the general agitation that precedes, accompanies, and follows the tension and emotion of an important experiment. There are indeed some signs of disorder in the Conseil, but they are strictly confined to the tables overladen with files, behind which one can barely make out the heads of the formally but elegantly dressed *conseillers*. In any case, this disorder is only temporary, because inside each file one finds a very precise order, prescribed by the *plan d'instruction*, which requires that each item be ordered, named, stamped, in accordance with a procedure which would be rendered invalid by any kind of modification. The impression of disorder is due only to the accumulation of pending cases; or, once a file has regurgitated its contents, to the abundance of legislative texts which have to be addressed, to the number of technical annexes, or to the weight of documentation and the intensity of the exchange which generated so many formal replies. Once the *dossier* has been replaced in its box file, once the case has been dealt with, order is immediately restored, and that is precisely how *conseillers* and lawyers deal with things. Once the file has been closed, they give it no more thought; they move on to another case, another file. A case is something that is opened and closed like a box file.

It might be said that even in the laboratory, disorder is more apparent than real, because each object, instrument, or experiment depends on an ordered document called the protocol book, which is more rigorous than any *plan d'instruction*. It is a sort of general audit of scientific activity in the laboratory, in which researchers note down what they propose to do, the raw results they obtained, and provisional hypotheses suggested by those results. Indeed, this great book has recently been given a quasi-legal status as a result of the spread of cases of fraud and of patents. Nevertheless, there is a world of difference between these two kinds of

accounting, because the protocol book does not contain the activity of the laboratory in the way that a file quite literally or physically *contains* cases referred to the Conseil. The laboratory could never be described by a unity that is as precise, as defined, as calibrated, and as homogenous as the number, nature, and placement of the Conseil's files. No claim has the closed, round, and polished form of a grey cardboard folder, which is easily transportable, in which everything is held and which forms the small world to which the judge has to restrict himself, on pain of a penalty. The work of the laboratory spills over at all points, depending as it does upon the future action of colleagues, the progress of technology, the complex play of intercitation, industrial production, public reaction. Only the box of tricks of scientometrics has managed to describe laboratory work in more or less coherent and standardized terms.¹² By contrast, there must be something in the file itself, in its closure, that supplies an essential reason for law's difference from the sciences.

To understand this difference, the file has to be seen in the context of the attitude of the *conseillers* who analyse, supplement, or discuss it. Coming from the laboratory, the ethnographer is immediately struck by the *indifference* with which members of the Conseil treat the documents which they have in front of them. In Rossier's laboratory, the act of writing was always an intensely passionate moment, and the re-writing of articles prior to publication involved heated discussions about what could or could not be said, about how far one could go without going too far, or about what had to be concealed for tactical or political reasons. They seemed more like lawyers preparing a case on behalf of their client than judges drafting their *arrêts*. Rather, members are as a rule indifferent to their file, and this indifference is punctuated by pulled faces, sighs, lapses of memory, a whole *hexis* of disinterest which contrasts very sharply with the obligation that laboratory researchers should be deeply, bodily, and passionately engaged in their observations about a matter of fact. In science, as in religion, it is necessary to display an attitude that declares a profound and sincere adherence to whatever one is saying, an adherence that will only be renounced when one is forced to do so by one's colleagues or (which amounts to more or less the same thing) by the facts. At the Conseil, on the other hand, it is essential to show, by means of a subtle body language, that one is quite indifferent

¹² Michel Callon, Jean-Pierre Courtial *et al.*, *La scientométrie* (PUF Paris, 1993), no. 2727.

to the argument one is making: 'If you don't accept my argument, you will accept the claim', might say a judge with Olympian calm, before embarking only a few minutes later on a line of reasoning that is diametrically opposed to the first. An observation made by a *conseiller* about a colleague who used to be a physicist reveals this difference quite nicely: 'Like a true scientist, he adheres too closely to his solution, contrary to myself'. For this particular *conseiller*, the *libido sciendi* displayed by his colleague was quite incompatible with the work of a judge.

In the procedures of the Conseil d'Etat, especially when they are contrasted with the scientific mode of attachment, one finds an accumulation of micro-procedures which manage to produce detachment and to keep doubt at bay.

THE RAPPORTEUR

When in the course of an *instruction session* (*séance d'instruction*) the *rapporteur* is asked to re-read his notes, he will have no recollection of them, several months having gone by since his examination of the file.¹³ Imagine how embarrassed a scientist would be if he were asked to present a research report which he had written six months or a year earlier, which he had not read again since then, and whose contents he had entirely forgotten. What is even more astonishing is that at the time of his initial examination of the file, the *rapporteur* would have prepared two contradictory drafts of decisions (*projets de jugement*), one arguing for a rejection of the request, the other for cancellation, should his colleagues not adopt his reasoning. So, not only does he have no recollection of the case, but he arrives at the hearing prepared for one course . . . and its opposite. For a scientist, this would be quite scandalous; it would be like deciding at the last moment, in the light of his colleagues' reactions, whether the phenomenon he was talking about existed or not, which would mean preparing two articles, two posters, two sets of transparencies, one for, and one against its existence. Worse still, once the discussion has come to an end, the president of the assembly can ask the *rapporteur* to draft a third project. And, far from taking umbrage at this expression of bad faith, the *rapporteur* politely gets on with job, immediately setting about writing a *projet* – which might even be contrary to that which he will vote for later. A scientific researcher would be made

¹³ The *séance d'instruction* precedes the deliberation properly speaking, it is a way of rehearsing the arguments before submitting the case to colleagues.

mincemeat of if he was required to write an article contradicting his own beliefs, on the pretext that the colleagues in his research team had formed a consensus opinion that contradicted those beliefs; he would insist that his minority view was represented in the final report, and would slam the door behind him if it was not. In any case, for him it would be a matter of conscience. It is not that judges do not have consciences, but that they place their scruples elsewhere.

We should not assume that the *conseillers* are indifferent, blasé, or bored by the cases that they deal with, or that they are detached in the manner of an automaton. Quite the contrary, they have plenty of interests, otherwise no one would stay at the Conseil for more than a couple of weeks. There is the legal complexity of the case itself, the structure of administrative law, the social, political, economic, or governmental implications of cases, the peculiarity of certain claimants, the scale of the injustices that are sometimes committed, the prestige of the State, the intellectual pleasure taken in extracting simple arguments from an obscure case, the pleasure of standing out amidst colleagues of one's own intellectual level, to say nothing of the gentleman's club-like environment in which future careers are plotted and past failures repaired. There are many sources of interest, but every effort is made to ensure that they are not attached to the file, to the bodies of opinion-givers, or to solutions adopted in much the same way as they are in everyday life, because they are held apart from the matter at hand, the object itself, by a distance that progressively becomes almost infinite. It is at this point that one can best gauge the abyss that separates law from science: whereas in the laboratory every effort is made to make a connection between the particularities of the object in question and what is being said about it, in the Conseil, by contrast, everything is done to ensure that the final determination is distanced from the particularities of the case.

THE RÉVISEUR

Nowhere is this contrast clearer than in the procedural phase when the *réviseur* re-presents the *rapporteur's* note of the case. From the perspective of the scientist, this procedure is quite absurd. Having just spent half an hour listening to someone reading in a monotone voice a text which explains the whole case, the *réviseur*, who is more highly placed in the hierarchy of the Conseil, takes up the story again from

the beginning, this time in oral form. The process of revision is nevertheless an essential moment in the process of judgment because the *réviseur* is the only person to have re-read the file the previous day, or the day before that, and who has retained all of the details of the case in his mind. None of the others is familiar with the case and none of them will read the file again, with the exception of the *commissaire* (see below) who will later become familiar with the case for the first time. This is another procedure that would seem out of place in science: the more the case progresses, lingers, or makes its way up the hierarchy of judgment, the more it is dealt with by people who are distanced from the file and who have no knowledge of it. In science, this would be like asking the advice of people who had fewer and fewer competences in the specific aspects of the subject to allocate claims about controversial discovery; or as though, in relation to a difficult question concerning invisible galaxies, one were to ask certain people, chosen precisely because they knew nothing whatsoever about galaxies, to determine the question, on the basis of no information other than an account of the issue given by people more competent than themselves.

But of course the procedure of revision is neither bizarre nor especially incongruous. As we shall see, what is in issue is not information; judges do not exactly determine the particularities of the case; there is more to the *réviseur*'s reprise than a simple process of repetition. In the guise of a simple process of repetition, the *réviseur* effectively transforms the case by altering the respective proportions of fact and law, placing more emphasis on strictly legal questions than the *réviseur*'s note. The particular case is less important than the point of law into which it is subsumed or than the particular reform of administrative law prompted by the case. Therefore, the *réviseur* has less to say about the facts (less, that is, than the *rapporteur*, who in turn had less to say about them than the lawyer, who had less to say than the claimant, who, of course, talks *mainly* about the facts!) and more to say about the law. When the judgment is delivered, nothing will remain other than the celebrated *green slip*, which summarises the whole case in a single sentence; such as, for example: 'Where a prefectural authority refuses to take cognizance of the peremption of a licence to work a quarry, made pursuant to article 106 of the Mining Code, can that order be reviewed on the grounds that it is *ultra vires*?' Nothing remains of the particular case, whose detailed facts can be discovered only by looking up the case on the computer database. There is no path relaying the *green slip* to the precise nature of the case, and yet, for the judges to whom this lapidary sentence is

addressed, the essentials of the experience are indeed summarised in a single sentence.

The word 'fact', which is used in both science and law, might well have led us astray in our comparison, because the same word is used so differently in each domain that it seems almost to be a homonym, or a *faux-ami*. The 'facts' in a legal file constitute a closed set, which is soon made unquestionable by the sheer accumulation of items, and to which it soon becomes unnecessary to return. Facts are things that one tries to get rid of as quickly as possible, in order to move on to other things, namely the particular point of law that is of interest, and to which the judges will be entirely devoted from that point on. In the laboratory, on the other hand, a fact occupies two somewhat contradictory positions: it is simultaneously that which is spoken of, and that which will determine the truth of what is being said about it. Therefore, one can never really dispose of the facts in order to move on to something more important. Unless, that is, one confuses laboratory facts, as I have described them, with the 'sense data' of the empiricist tradition which was invented by Locke and Hume for reasons that were more political than epistemological, 'sense data' being the incontrovertible basis of our sensations, which the human mind combines in such a way as to develop more general ideas. But, as we shall see, the way in which this kind of fact distinguishes that which is debatable from that which is not has nothing to do with the mode of speech of researchers. It owes more to law than to science.¹⁴ Rather than confuse the two, we should sharpen the contrast: when it is said that the facts are there, or that they are stubborn, that phrase does not have the same meaning in science as it does in law, where, however stubborn the facts are, they will never have any real hold on the case as such, whose solidity depends on the rules of law that are applicable to the case.

Nevertheless, it should not be assumed that there is a crisp distinction between the scientist's 'respect for the facts' and the lawyer's emphasis on form or indifference to the claimant's demands. In the laboratory, the particular facts do not count either: the rat which gave its brain to the experiment thereby donates its body to science, and the body will be summarily incinerated; a particular neuron, having ceased to live, will be abandoned in much the same way; also, raw data will be very quickly forgotten. The phenomena put to the proof of an experiment

¹⁴ Mary Poovey, *History of the Modern Fact: Problems of Knowledge in the Sciences of Wealth and Society* (Chicago University Press, Chicago, 1999).

are interesting only because they are the instantiation of a problem, the exemplification of a theory, the point of an argument, or the proof of a hypothesis. But how does this differ from the movement of law, because both regimes drop the substance they talk about in order to address that which it exemplifies. The difference consists entirely in the possibility that a theory, if it is a good one, has to be able to generate the fact by a process of retroaction: the theory includes all the important details of the fact, otherwise it would not be the theory *of* that particular fact and would be no more than an unfounded hypothesis, pure speculation, or a simple proposition which had never been put to an empirical test. This retrodictive path does not exist in law, where, in any case, it would be quite meaningless. What makes our friend Rossier such a good neuroscientist is that his theory of the expression of neurons is able to retrace the precise path of each of the neurons he has sacrificed throughout the experimental process, or of any other neuron included in his experimental protocol. In law, so long as you have grasped the point of law, you do not have in your grasp a fact which is liable to emerge unpredictably to surprise you at any moment; in science, if you have grasped the theory you should be able to return to the facts from which you began, and even anticipate new facts.

THE COMMISSAIRE DU GOUVERNEMENT

There are yet other minor procedures which compel even the most interested, passionate, or expeditious of *conseillers* to become indifferent, objective, fair, and dispassionate. Could one imagine anything in science resembling the *commissaire du gouvernement*,¹⁵ who remains silent throughout the whole *séance d'instruction*, taking notes? Is this person the secretary to the meeting? Hardly, because his notes are made for his own use only, in that they help to prepare him for his reading of the file, which he will go over from beginning to end. Might he then be the ultimate expert to whom less skilled *conseillers* have entrusted the task of finding the right solution? No, because he is often younger than the president of the assembly, who will subsequently pass

¹⁵ The word '*commissaire*' is even more confusing in English than in French. This government '*commissar*' is exactly the opposite of a commissar sent by the government(!) since he is totally independent. The word has been kept for obscure reasons of legal conservatism.

judgment on his commentary. Now, he keeps quiet, and they do the talking; tomorrow, or in a few days time, he will speak, and they will keep quiet.¹⁶ In that case, why not get it over with, and ask him to give his opinion there and then? Because although the object is to get things over with, it is to do so with all the appropriate forms, having once again explored the relationship between this particular case and the law, the case in its entirety and the law in its entirety. One might say that the *commissaire du gouvernement* has been entrusted with a particular task of quality control, in that he is asked to retrace the course taken by the claimant, the lawyers, the judges of first instance, the *rapporteur*, and the *réviseur*, before going on to review the vast accumulation of two centuries of administrative law, in order to ensure that the whole thing is properly and securely bound together. He is the person who tests connections and ensures coherence, and who reassures his colleagues that the daily process of stitching things together has not corrupted administrative law in any way. The silence of the *commissaire du gouvernement* throughout the *séance d'instruction*, the formal reading of his conclusions during the *audience*, his return to silence throughout the stage of the deliberation (in which, it should be remembered, the judges have no obligation to adopt his reasoning), then the separate publication of his conclusions, which might or might not differ from those of the judgment, which is itself published, function as set mechanisms invented entirely within the Conseil d'Etat so as to produce a mode of detachment which in science would seem incongruous, not to say comic.

In science, the role of the *commissaire du gouvernement* could be replicated only by entrusting a scientist with the overwhelming task of reviewing his entire discipline from the beginning, in order to test its coherence and to ensure its relation to the facts, before proposing the existence or non-existence of a given phenomenon in a formal deposition, although the final decision would not be his, and although he would have to work alone, guided only by his own knowledge and his own conscience, being content to publish his conclusions quite independently. Although something like this role can be found in the form

¹⁶ One feature of French administrative law is that the whole procedure is written, with no oral argument other than the presentation read out loud and standing by the *commissaire* and which is called his *conclusions* for the reason that they do not conclude the judgment. Law is really very peculiar.

of scientific review articles,¹⁷ which are commissioned from experienced scientists in mid-career, who are expected to summarise the state of the art for their peers, review articles do not have this peculiar mixture of authority and absence of authority. Either the *commissaire du gouvernement* is like a scientific expert, in which case his greater authority should relieve his peers of their obligation to doubt – he knows more about the issue than they do – or he is simply not playing the role of the expert, in which case why place on his shoulders the crushing burden of having to review the whole case in order to enlighten the process of judgment? The role of the *commissaire du gouvernement* resembles that of a scientist only to the extent that he speaks and publishes in his own name; similarly, there is something of the *conseiller du gouvernement* in all scientists, who see themselves as enlightening the world. The *commissaire du gouvernement* is, then, a strange and complex hybrid, which has something of the sovereignty of *lex animata*, law embodied in a man, but whose pronouncements bind no one but himself, whereas in the old world sovereigns always had the last word. In that case, what does he do? What is his function? He gives the whole team the occasion to doubt properly, thereby avoiding any precipitously-reached solution, or any cheaply-bought consensus. He is, in a sense, an airtight chamber for the avoidance of certainty, a kind of injunction to avoid agreement, an obstacle deliberately placed along the entire length of the path of judgment, a grain of sand, occasionally a scandal, but in all cases an irritant, or a resistance; the *commissaire du gouvernement* is the most peculiar example of a producer of objections, or of objectivity.

The importance and the ambiguity of his role are clearest in those cases in which he argues for the overruling of existing precedents, this being the legal equivalent of the process (which so excites researchers) by which scientific paradigms are overthrown. Because he, unlike his colleagues, is not bound to reach final judgment, he can allow himself (with one eye on the case itself, and another on the corpus of law) to suggest substantial alterations to this vast structure, whose coherence is produced by a kind of ongoing balancing act, similar to that which keeps a cyclist in the saddle. Precisely because he is not obliged to do anything but prompt the law in the moment, without himself having to pass judgment, he can allow himself to indulge in the sort of audacious

¹⁷ F. Bastide, M. Callon *et al.*, 'The Use of Review Articles in the Analysis of a Research Area' (1989) 15/5/6 *Scientometrics* 535.

developments or deepenings which would terrify the *conseillers*, who are always kept in harness, bearing on their shoulders the weight of administrative realities. There is always a certain freshness to *commissaires du gouvernement*, and they are in any case worn out after a few years.¹⁸ But unlike scientists, who dream of overturning a paradigm, of putting their names to a radical change, a scientific revolution, or a major discovery, *commissaires du gouvernement* invariably present their innovations as the expression of a principle that was already in existence, so that even when it is transformed completely the corpus of administrative law is 'even more' the same than it was before. This prowess is required by the essential notion of legal predictability (*sécurité juridique*), which would seem quite out of place to a researcher. Just imagine the effect of a notion of scientific certainty on research: what was discovered would have to be expressed as a simpler and more coherent reformulation of an established principle, so that no one could ever be surprised by the emergence of a new fact or a new theory.

THE FORMATION DE JUGEMENT

Let's get it over with! We've had enough! We know enough to pass judgment! It is as plain as day that claimant A is in bad faith, drug dealer B a toad, and claimant C a fussy nit-picker, that minister D is plain incompetent, decree E a tissue of absurdities, and police prefect F a public menace, so why prolong the discussion? The facts are blindingly obvious. You have already read the open-ended note of the *rapporteur*, heard the *réviseur*, spent two hours in the *séance d'instruction* discussing the case, the president has consulted on the matter with the Président du Contentieux, you have heard the conclusions of the *commissaire du gouvernement*, and still you haven't finished? No sooner has the *commissaire du gouvernement* sat down than you resume your deliberations again, this time with a new set of discussants, that is, a fresh set of people who are ignorant about the case, who have heard neither the *rapporteur* nor the *réviseur*, who have heard nothing of the discussion, and ask the same old naïve questions. Isn't that all extremely disheartening? Why not give the file to the *commissaire du gouvernement* and close the case for good. Let's say no more about it. Enough prevarication. Yet, it is essential to hesitate and doubt, precisely so as not to rush towards blindingly obvious truths. The tedious succession of reviews and revisions, the

¹⁸ There are about 20 *commissaires* for the 200 *conseillers* at work in the Conseil.

meticulous verifications of bureaucratic stamps, and the repetition of preambles ensures that blind, stumbling, justice can walk in a straight line and say exactly the right thing. All these procedures of detachment allow the law to ensure that it has doubted properly, whereas almost all the elements of a laboratory tend to the speediest possible acquisition of certainty. If Justice holds a set of scales in her hand, it is not because she weighs exactly, but because equilibrium has been disturbed a little.

Common sense finds the slowness of both law and science incomprehensible: why take so much trouble to judge? it asks. Why go to so much hassle to know? it asks, astonished. Do we really need all these distancing procedures in order to deal with a case about dustbins, pigeons, planning permissions, or appointment procedures? Is it really necessary to spend so much money, to mobilise the best and the brightest, and to spend years on claims which could easily be resolved with a bit of common sense and a measure of good faith?¹⁹ Is it really necessary to sacrifice hundreds of rats, to mobilise an elite of men in white coats, or to invest in extremely expensive instruments in order to learn how our brains work or how many stars there are in the sky? What a waste of time! How slow! If the production of doubt in law and of knowledge in science were criticised in these terms by ordinary common sense, judges and scientists would immediately join forces to celebrate time, slowness, care, expense, elitism, quality, or respect for procedure. Both scientists and judges would exclaim that common sense, with its crude methods, could produce neither this effect of slowness of judgment nor confidence in certainty: it would reach a conclusion too quickly, too hastily and on the basis of superficial first impressions; we depend vitally on these costly and ponderous institutions, which require the complex elaboration of an esoteric vocabulary and the application of procedures that are exasperatingly meticulous, because these are the only means we have to avoid arbitrariness and superficiality.

And yet common sense is right: things have to be brought to an end. And here, once again, science and law, which seemed for a moment to be united in their defence of their procedures, rather than their privileges, are shown to be quite different. At the Conseil d'Etat, every effort is made to sustain doubt for as long as possible, but when a decision is reached it is made once and for all. In the laboratory, every effort is

¹⁹ In addition to political appointees, the bulk of the Conseil is formed by young graduates from the very prestigious *Ecole nationale d'administration*.

made to reach certainty, but in the end it is left to others, to colleagues, to a point in the future, to the dynamic of the scientific field, to decide on the truth value of what is said. This attitude is completely opposed to what one finds in law: suddenly, after months or years of waiting, the case has to be concluded. And this is not just a possibility but an obligation, which is inscribed in the law: a judge has to decide, otherwise he abuses his authority. Although he has gone to all this trouble to slow things down, to observe formality, to collectivise, to become detached and indifferent, to distance himself, judgment must now be issued. That is the object of the process of deliberation. The only available escape route lies in deciding that the decision cannot be taken alone, that the case is too serious, so that one has to remove the case to a stage further up the hierarchy.²⁰ But this change of direction only puts off the inevitable. The Conseil d'Etat will have to make the decision. It is the ultimate tribunal. The only way to get judgment over with is to pass judgment.

A laboratory works in quite the opposite way: it has gone to considerable trouble to cover its back, to multiply its data, to verify its hypotheses, to anticipate objections, to choose the best equipment, to recruit the best specialists; it has drafted the most combative article, chosen the best journal, organised the most skilful leaks to the press, and then suddenly, at the last moment . . . except that there is no last moment! Quite unconcernedly, the researchers, having passionately pursued the truth, and now being unable to control the fate of their claims, leave it to others to take care of verifying them. 'We'll soon see what they have to say; the future will say whether we were right or not'. The tribunal of history is a strange sort of court because it lacks the most essential quality of a court: the absolute obligation to pass judgment now, without putting it off until later, and without delegating the task to someone in the future, who might be better qualified or superior in rank to oneself. Having accumulated their proofs of modesty and distance, the judges abruptly, and with the greatest arrogance, take on the wrath of sovereignty: they decide the issue. Scientists, having exercised all the passions of knowledge and every pretension to certainty, suddenly become modest and humbly defer to others.

²⁰ There are five different levels inside the same Conseil d'Etat, to judge cases from the least to the most important case. Contrary to English-speaking systems, the Conseil occupies the position of first and last instance depending on the topics. It is also at the top of a long chain of administrative tribunals for first instance and appeal courts.

CHAINS OF REFERENCES AND CHAINS OF OBLIGATIONS

But to distinguish passion on one side, and detachment on the other, scientists' interest and lawyers' disinterest, modesty and authority, or closure and openness, is to make what is still only a surface comparison, lying in the indeterminate zone between psychology and ethology, between procedure and content. In order to deepen the analysis, which aims to distinguish scientific and legal activity, which are so often confused, we should now, at the risk of tiring the reader, trace out the workings of these two modes of enunciation even more closely, by distinguishing the chains of reference which anthropologies of science have studied very closely from legal chains of reference, which are very difficult to describe.²¹ However, the task is not impossible, because the fabrication and processing of files reveal the traces of these two ways of establishing relations, which in one case are made of information, and, in other, of what can only be called *obligation*. But what does that mean? I shall try to describe what is transported from one layer of inscription to another in the course of an experiment, and what happens to a file when it undergoes the process through which legal grounds are extracted from it. My hypothesis is that most of the superficial features that we have set out so far are explained by the differences between these two orders of circulation.

Before exploring these differences, we should recall the common origin of both legal and scientific practices, the ancestral learning that still constitutes the basic apprenticeship of scientists and lawyers, namely, the manipulation of texts, or of inscriptions in general, which are accumulated in a closed space before being subjected to a subtle exegesis which seeks to classify them, to criticise them, and to establish their weight and hierarchy, and which for both kinds of practitioner replace the external world, which is in itself unintelligible. For both lawyers and scientists, it is possible to speak confidently about the world only once it has been transformed – whether by the word of God, a mathematical code, a play of instruments, a host of predecessors, or by a natural or positive law – into a Great Book, which might equally well be of nature or culture, whose pages have been ripped out and re-arranged by some diabolical agency, so that they have now to be compiled, interpreted, edited, and re-bound. With scientists as with judges, we find

²¹ On chains of reference, see Bruno Latour, *Pandora's Hope: Essays on the Reality of Science Studies* (Harvard University Press, Cambridge, MA, 1999).

ourselves already in a textual universe which has the double peculiarity of being so closely linked to reality that it can take its place, and yet unintelligible without an ongoing work of interpretation.²² And both for scientists and lawyers this incessant activity generates new texts, whose quality, order, and coherence will, paradoxically, increase the complexity, disorder, and incoherence of the corpus they leave to their successors, who will themselves have to take on this labour of Sisyphus or Penelope. Stitching, weaving, reviewing, and revising of Exegesis, mother of both science and law.

The common exegetical role of the good researcher and the good lawyer can be seen in the way that they both evaluate stacks of heterogeneous documents by attributing a different value of trust to each. Just as the expression '*Qui sera publié au recueil*' carries more weight than '*aux tables*' in the description of a precedent, so an article published in *Nature* or *Science* will elicit a greater degree of attachment than a pre-print posted on a website. Both scientists and lawyers have great respect for existing publications (which in both disciplines can be tracked down by a coded scheme of citation and references) and yet both have a certain distance, defiance, or even disrespect for too close a linkage of references. Just as a *commissaire du gouvernement* will say, quite politely, that 'This decision seems to me to be quite isolated, and, in truth, quite unrepresentative of the case law', so a researcher will have no hesitation in writing that 'Although there are a number of experiments which assume the existence of this phenomenon, no conclusive proof has ever been provided'. Both differentiate very subtly between those documents which are assured and those which leave enough gaps and contradictions on which to hang the argument, or to suggest alternative formulations. Both kinds of practitioner work collectively, and without the close collaboration of their colleagues they would be quite unable to say anything at all. In both domains, everything may already have been written, but still nothing has yet been written, so that it is necessary to begin again, collectively, with a new effort of interpretation.

However, whereas in the Conseil d'Etat the act of writing is always explicit, in a laboratory such as that of Rossier, it always seems to be a mere appendage of scientific work, or perhaps even a kind of chore. For

²² This is the main thrust of Pierre Legendre from *L'empire de la vérité: introduction aux espaces dogmatiques industriels (Leçons II)* (Fayard, Paris, 1983) to *Sur la question dogmatique en Occident* (Fayard, Paris, 1999).

example, on arrival at the Conseil, each new member receives two documents: the *Memento du rapporteur devant les formations administratives du Conseil d'Etat*, and the *Guide du rapporteur de la Section du Contentieux*. These substantial volumes, which explain in detail how to draft notes and *arrêts*, are essentially style manuals paying as much attention to the form of bureaucratic stamps and endorsements as they do to the proper layout of paragraphs or correct punctuation. Although there are (especially in the United States) courses which provide future scientists with a training in writing skills, most laboratory workers would be surprised to find their activity described as a work of exegesis. Until this character was revealed by the anthropology of science, scientific texts were assumed to be nothing more than supports for information, whose only virtue was transparency, and whose only defect obscurity. In order to re-connect the sciences with their ancient roots, these texts had to be seen in the light of the output of laboratory instruments and the important role of intercitation. Only then could scientific authors once again appear as hermeneuticists, as writers or scholars, except that the texts they compare incorporate textual proofs extracted from phenomena put to an experimental trial. *Conseillers*, on the other hand, are always talking about their writing activities, and quite often speak in formulaic phrases made up of citations. For them a text is never just a support for information, and is never evaluated on the basis of its clarity alone; indeed, that much becomes obvious if one reads any of their writings!

If we remind ourselves of their common roots, it becomes impossible (whatever might be said in the vast body of writing on the subject) to distinguish scientific texts, which are supposed to be factual and impersonal, from legal texts, which are supposed to have the special property of doing what they say, or, depending on the circumstances, of saying what should be done. There are, of course, a number of differences, but we should hesitate to understand these in terms of the conventional distinction between fact and law, or between declarative and performative statements. Scientific texts, as I have already suggested, resemble neither the mythical statements of rhetoricians or philosophers of language ('water boils at 100 degrees') nor affirmations ('the decision made on 17 April 1992 by the administrative court of Grenoble is hereby overturned'). Unlike the manuals or encyclopedias with which they are so often confused, the scientific or research text that emerges straight from the laboratory deals not so much with a fact that has to be described, but with a profound *transformation*, which the word 'information' does not really describe. Unless, that is, the term is understood etymologically, to

mean placing within a *form*, the latter being understood quite literally or materially, as consisting in a graph, equation, or table. No *in*-formation can be produced without a cascade of these sorts of *trans*-formations.²³ Moreover, no scientific article would make do with a single such transport, with just one representation in the form of a graph, but has instead to orchestrate dozens, each linked to the other so as to compose a drama or a chain of reasoning, each one being precarious in the sense that it seeks to carry over all of the relevant elements of the preceding layer while at the same time thoroughly modifying them so as to give added force to the particular theory, formula, or interpretation. Finally, as I have observed, this whole process of transformation takes the form of a claim or petition, which is characterised by uncertainty and danger, and which the authors release into the mass of existing publications.²⁴ The truth value of the statement will be attributed retroactively, from the treatment that the claim or petition receives at the hands of other authors, supporters as well as detractors.

This sort of textual trail, or complex alchemy, has no more to do with the common sense notions of a factual statement than it does with legal texts. If the very particular kind of activity that one finds in laboratories is understood as the hazardous construction of referential chains, one can find numerous traces of that process in judicial files, but far from defining the nature of judicial activity, it merely organises a few of its segments, the remainder being characterised by activities that are more properly legal. For example, the question whether a map was annexed to a file might be answered by the referential gesture of pointing to the file, or the map might be adjudged to have been annexed by connectivity.²⁵ In this manoeuvre, the furrow of one referential chain is abandoned in favour of another, which we have still to define.

The differences between law and science are clearly revealed in the clash or interruption of these two furrows. For example, if the question whether an acknowledgement of receipt was actually sent is raised in the course of a hearing, and the file contains the appropriate post

²³ Mike Lynch and Steve Woolgar (eds.), *Representation in Scientific Practice* (MIT Press, Cambridge, MA, 1990).

²⁴ See Ludwig Fleck, *Genesis and Development of a Scientific Fact* (University of Chicago Press, Chicago, 1935) for a classic analysis of this alchemy.

²⁵ In one of their decisions, the Conseil had judged that a map for a building authorisation is 'said to be' annexed to the expulsion procedure file even though it is not physically present in the annex, provided it can be consulted somewhere at the mayor's office.

office form, signed and dated by the claimant, the quality of the reference is unquestionable; similarly, when the assembly is convinced, having taken a common sense approach in reading tracts annexed to a file, that a candidate defamed his opponent to some degree on the eve of the election; or, again, where an aerial photograph attached to a file allows them to establish whether or not a park is fully enclosed by a wall, this being the point at issue, the judges retrace a short referential chain by doing what geographers, geologists, or surveyors might do, that is, by superimposing layer upon layer of documents and tracings, which are very different in terms of their materiality (photographs, graphs, documents, and plans) but which by their nature keep information intact across a play of transformations. But the judges' confidence would soon evaporate if, instead of having to make the few referential steps which they take when they track a map, graph, signature, or opinion through their files, they had to cross the dozens of transformations that are necessary for scientists to establish a reasonably solid proof in a somewhat specialised field. Would a judge agree to entrust his judgment to an electronic microscope which requires a hundred or so adjustments, each of which completely transforms the initial sample?²⁶ A judge would exclaim indignantly that he needed a more 'direct contact' with reality.

On the other hand, would a researcher agree to make a decision on the basis of a frame that was as narrowly defined as 'what is contained within the file'? The short referential chains which are contained in the folder would soon be disrupted by slippages, dislocations, and changes of register which would be horrifying to scientific researchers. When a judge says that there is nothing in the file to the effect that a foreigner expelled from France had children born in France, he satisfies himself with the limits defined by the antagonistic logic of the case, and settles for an inquiry as to whether any defence submission had disputed the fact, using the phrase, 'and that point was not contested'. A procedure of this sort, which requires that one keep to the traces accumulated in the file, would freeze the blood of a scientist. He too, like his judicial critic, would demand a more direct, richer, and more living, contact with reality! 'Let's put the file to one side and go and see what's happening for ourselves, let's do some fieldwork, question the witnesses, forget

²⁶ Peter Galison, *Image and Logic: A Material Culture of Microphysics* (University of Chicago Press, Chicago, 1997).

the pathetic arguments of the lawyers, and escape from the straight-jacket of this paper world, which is unable to capture reality'. The point is that the researcher confuses the *supplément d'instruction* with the process of judgment. His objective is always to know more, and he would expect there to be a two-way path between the offices of the Conseil and the facts, which would allow the transportation of (appropriately transformed) information to be continually improved. But, as a result, he would accumulate more and more information without yet being able to pass judgment. The process of *instruction* would be inflated to quite fearsome proportions, and no decision would ever be reached. He would, in fact, be engaging in research, not judgment.

Lawyers and scientists are each scandalised by the other's forms of enunciation. They both speak truth, but each according to a quite different criterion of truth. Judges consider that scientists have access to what is only a pale version of reality, because they write articles which have a relation to the facts they describe that is so indirect that there are dozens of steps in their reasoning, and as many leaps from each graphic representation to the next. Scientists, on the other hand, do not understand how judges can be content with what is wrapped in their files, or how they can apply the term 'incontrovertible fact' to a submission that has not been contradicted by a counter-submission. Scientists, by contrast, measure the quality of their referential grip in terms of the mediate character of their instruments and their theories. Without making this long detour, they would have nothing to say other than whatever fell immediately before the senses, which would be of no interest, and would have no value as information. Judges, for their part, hold that the quality of their judgments is closely dependent on their ability to avoid the two hazards of *ultra petita* and *infra petita*: that is, issuing a judgment that either goes beyond or falls short of that which the parties have asked for. What seems to judges to be a major failing is considered by scientists to be their greatest strength; yes, they can only attain precision by progressively distancing themselves from direct contact. And that which scientists regard as the greatest defect of law is taken as a compliment by the *conseillers*: they do indeed stick to what can be elicited from the file, without addition or subtraction. Here, we have two distinct conceptions of exactitude and talent, or of faithfulness and professionalism.

It might be argued that these differences are quite minor by comparison with what both have in common, namely the reduction of the world to paper. From this overly general perspective, both scientific inclusivity

and the inclusivity of the file resemble stuffing a quilt into an envelope. But these are two very different modes of reduction, and the whole aim of this section is to distinguish them. The important thing is to understand how the relation between the legal file and the particular case is unlike the relation between a map and the territory, if maps are taken as both a symbol and an example of chains of reference.

Legal reduction seeks to constitute a domain of unquestionable fact as quickly as possible (which means only that there should be no submission from the defence contesting those facts), so that it can then subsume the facts into a rule of law (which is in practice a text) in order to produce a judgment (which is, in reality, a decree, a text). Scientific reduction effects the same astonishing economy because it too replaces the richness and complexity of the world in all its dimension with paper and texts. But the approach it establishes is utterly different because, once one is in possession of a piece of paper, a document, or a map, it is always possible to retrace one's steps, returning to the territory to pick up the trail, once one has found the signposts, the surveyor's stakes, or the right perspectives and calculations of angles. At each point, the reasoning process takes hold on the superposition of instruments, graphs, theodolites, markers, graduations, and measurements which enable reasoning to act as though it was always moving from like to like above the abyss of the transformation of matter. But in law, even when resemblance or precedent is invoked, what is involved is never a precise superposition. When the *rapporteur* says:

One of the arguments alleges a procedural impropriety, on the basis that the plan was neither initialled nor numbered by the *commissaire enquêteur*; this allegation is not supported by the facts because although the register was initialled only on every other page, this is not serious because the cases define a leaf as a folded sheet.

The miniscule portion of reference that enables him to verify the signature is immediately diverted, or, more precisely, relayed, by the legal definition of a leaf. This does indeed involve tracing a path, but in this case it binds a factual element to what lawyers call a 'qualification': 'is this a leaf in the sense that the term is used in article 13–25 of the procedural code of the *déclaration d'utilité publique*?' Someone who holds a map in their hands also holds the territory, or at least a two-way path that would allow him to learn more on the occasion of the next iteration, or on the occasion of his next visit to the territory; someone who holds a file has established a connection that means that he will no

longer have to learn anything more from the fact, and which, on his return, will allow him to transport an unquestionable decision.

The difference between reference and qualification is clearly exemplified in a case in which an assembly had to decide whether the illustrator of a gardening magazine, who had been refused a highly coveted press card on the grounds that she did not deal with current affairs, could have the decision of the journalists' professional body overturned. As one might expect, there was some discussion of the distinction between current affairs and seasonal affairs: are this year's peonies, peach trees, or kiwi fruit 'current affairs'? Is the person who illustrates them 'a reporter'? But this question of substance would lead nowhere, because the question is not whether an illustrator of current affairs is really, truly, fundamentally, or referentially a reporter, but whether, as against the professional body, she is able to establish that quality 'within the meaning of article L 761-2 of the employment code'. There is simply no relation between this and a definition of essence, nature, truth, or exactitude. Or rather there is, but the relation is one of simple connectivity: it is not necessarily the case that progress in one dimension advances things in the other dimension, or vice versa.

It being the case that Mme Eyraud claims the status of a professional journalist as an illustrator-reporter; and pursuant to the provisions of the third subsection of article L 761-2 of the employment code, which states that 'The following participants in the editorial process shall be treated as professional journalists: translator-editors, stenographer-editors, sub-editors, illustrator-reporters, photographic reporters, except advertising agents, and those who participate in the editorial process only occasionally'; given that according to the facts of the case the duties of Mme Eyraud, who is employed by the magazine *Rustica* as an illustrator, consist in the illustration of sheets which are designed to describe methods and techniques of gardening; and given that in this case these illustrations are sufficiently linked to current affairs as to characterise their illustrator as a reporter in the meaning of the foregoing provisions; Mme Eyraud is therefore able to claim the benefit of article L 761-2 of the employment code.

Even in this very simple case, the two forms of discourse, that of the dispute itself and that of law, remain absolutely heterogeneous. What does it mean to say that 'in this case these illustrations are sufficiently linked to current affairs'? However much you play with the meaning of article L 761-2, it will not provide you with the answer to that question. The text says nothing other than that, in this particular case, the judges

considered Mme Eyraud to be a reporter within the meaning of the article. Full stop. 'Yes, but is she really a reporter?' one might ask. What does the notion of a 'sufficient link' mean? That question would carry us all the way along a referential chain, distancing us from another chain, that which ensures the fragile and provisional linkage between a text and a particular case.

Ah, you might say, but this is a very familiar kind of operation: this is just a process of classification. In much the same way as a postman uses the departmental postcodes written on envelopes to sort letters into boxes ordered by ZIP codes, so a legal file allows one to order the facts of the particular case according to the relevant categories, such as, for example, legal error, *ultra vires*, or public works. But the word 'classification', like the words 'reduction', 'fact', 'reasoning', 'judgment', or 'qualification', changes its meaning depending on the kind of enunciation that we are trying to characterise. A process of scientific classification would allow one to subsume each particular instance within the category in such a way that, having established that A is an instance of B, anyone who had B in their possession could obtain A, or at least all of the relevant features of A. If A is an instance of an acetylcholin receptor, given a knowledge of acetylcholin receptors I would know all that there is to be known about A. But this is not how particular facts are qualified by legal rules: nothing in article L 761-2 tells one whether the facts of the next case will or will not disclose a sufficiently close connection to current affairs. The rule contains no knowledge or information about the particular facts, except in the most superficial sense; one might say, for example, that such and such a case is a case of *ultra vires*, which would mean that the *Service des analyses* should steer it towards a particular assembly specialised in those topics. But this kind of ordering is of assistance in logistics rather than in judgment. Minor referential chains (A is an instance of B) are subordinated to what, from the point of view of the law, is the only true kind of chain: A is an instance of B as it is defined by article C. Whereas in science the relation between the instance and category is taxonomic, in law this is only superficially true. In both cases one finds linkages and pathways establishing numerous relations between texts and events, but in each case the grids differ as much as a grid of fibre optic cables differs from an urban gas supply network.

To enter a referential chain is to approach things quite differently from a legal file. The cascade of transformations which produces

information is such as to oblige the protagonists to produce that rarest of commodities: new information about newly-forged beings, which have come into contact with science and which have to be recognised, taken into account, ordered, and qualified in such a way that, once these requirements have been satisfied, one might return to them in order to gather supplementary information or fresh knowledge, until eventually they have been so thoroughly disciplined, understood, trained, domesticated, and mastered that they can be put in a 'black box', at which point they can be considered as known, and used as the premises of new processes of argumentation or experimentation.²⁷ This dynamic of knowledge patterns the world with two-way paths which eventually saturate the territory that is being mapped, thoroughly confusing the two registers in a single truth-telling discourse. Those who are recognised by their colleagues as the fortunate producers of new and reliable information will be rewarded with eponymy; their name will forever be associated with a particular discovery, such as Newton's laws or Boyle's law.

Strangely, eponymy exists in law but it rewards not the judge but the claimant, whose name will forever be associated with an important decision which, as they say, is a 'landmark decision'. Although the name of the *commissaire du gouvernement* is sometimes attached to a decree, above all if his conclusions are published, no one remembers the name of the author of a landmark decision, which is necessarily anonymous; and, as we know, every effort is made to ensure that change is presented in terms of legal continuity: the phrase '*plus ça change, plus c'est pareil*' is absolutely applicable to a corpus of law. Whereas in science everything is done to ensure that the impact of new information upon a body of established knowledge is as devastating as possible, in law things are arranged in such a way as to ensure that the particular facts are just the external occasion for a change which alters only the law itself, and not the particular facts, about which one can learn nothing further, beyond the name of the claimant. In law too, paths are traced across the world, weaving numerous relations between claimants, legislative acts, decrees, and codes, but these links do not produce any information or novelty: they are traversed by *moyens*, vehicles that are every

²⁷ For two recent marvellous examples see Hans-Jörg Rheinberger, *Toward a History of Epistemic Thing: Synthetizing Proteins in the Test Tube* (Stanford University Press, Stanford, 1997); Karin Knorr-Cetina, *Epistemic Cultures: How the Sciences Make Knowledge* (Harvard University Press, Cambridge, MA, 1999).

bit as original as information, but which are quite different, and which we have to study further if we are to describe them properly. The difference is clearest in the situation where a *conseiller*, addressing a difficult point, exclaims that 'Since last week, we know that . . .'. The knowledge in question does not rest on a newly established connection between a fact and a theory, across the hazardous passage of a referential chain; rather, it means that 'We have decided the question, and there is therefore nothing more to be discussed'.

RES JUDICATA PRO VERITATE HABETUR

No bond is stronger than legal obligation or certainty as to facts. That was what led me to make this (occasionally daring) comparison between two activities which are entirely different, but whose precise and intricate manufacture is unknown to the broader public. But, as we have seen, popular representations of law and science confuse the features of the two activities so much that they are of no assistance in elaborating this comparison. However striking the differences, and however much those differences are accentuated at each stage of the comparison, they are difficult to pin down because, on the one hand, judges appropriate the scientist's white coat in order to represent their role, while, on the other, scientists borrow the judge's robes of purple and ermine in order to establish their authority. At the risk of momentarily abandoning ethnography to engage in philosophy, I shall conclude by drawing up an inventory of these exchanges, so as to render unto Caesar that which is Caesar's, and to render unto Galilee that which is Galilee's.

Most of the qualities that are commonly attributed to scientists are drawn from the micro-procedures invented by lawyers to produce their fragile ethos of disinterest.²⁸ Indifference to the outcome of a case, the distance established between the mind and the object that is being spoken about, the coldness and rigour of judgment, in short, everything that we associate with objectivity, belongs not to the world of the laboratory or of calculation, but to the judicial bench. Or rather, we should distinguish objectivity as the basis of a mood of indifference and serenity as to the solution, from what might be termed 'objectivity':

²⁸ For reasons which have been studied in Steven Shapin and Simon Schaffer, *Leviathan and the Air-Pump: Hobbes, Boyle and the Experimental Life* (Princeton University Press, Princeton, 1985).

the ordeal by means of which a scientist binds his own fate and that of his speech to the trials undergone by the phenomenon in the course of an experiment. Whereas objectivity pertains to the subject and his interior state, objectity pertains to the object and its peculiarly judicial role. The same adjective – ‘he has an *objective* mind’ – can therefore point to two quite different virtues, one of which is essentially just a particular form of subjectivity (distance, indifference, disinterest) and the other a very specific form of subjectification in which the researcher subjects himself to an experimental object. Doesn’t this common sense admiration for the objectivity of scientists imply that they should sit as judges? And when, on the other hand, common sense complains about the fragility of its lawyers, doesn’t this imply that they should display the same kinds of objects as laboratory researchers?

The strange thing about legal objectivity is that it quite literally is *object-less*, and is sustained entirely by the production of a mental state, a bodily *hexis*, but is still quite unable to resign its faculty of judgment by appealing to incontrovertible facts. It therefore depends entirely on a quality of speech, deportment, dress, and on a form of enunciation, and therefore on all of those external appearances that have been derided since Pascal, without recognising that this respect for appearances is a form of objectivity that is unattainable for scientists. Scientists speak inarticulately about precise objects, lawyers speak in precise terms about vague objects. That is because judges have no superiors to whom they might refer the task of judgment (unless, of course, they are judges of first instance). Scientific objectity, on the other hand, is distinguished by the fact that it is *subject-less* because it accommodates all sorts of mental states, and all forms of vice, passion, enthusiasm, speech deficiencies, stammers, or cognitive limitations. However unfair, excessive, expeditious, or partial researchers might be, they will never lack an object. Above each of them, like the sword of Damocles, hang the facts – or rather the strange hybrid produced by the encounter between incontrovertible facts and controversial colleagues – and this threat is sufficient to call even their most extreme enthusiasms or injustices to order. Suspended above researchers, there is always a third object that is appointed judge and charged with deciding on their behalf, to which scientists delegate the task of judging, without worrying whether they themselves, in their own consciences, are ‘objective’.²⁹ As for

²⁹ In the formulation given by Isabelle Stengers, *L’invention des sciences modernes* (La Découverte, Paris, 1993), ‘an experiment is the invention of a power to grant things

judges, they have no one else to judge on their behalf, and they can become 'objective' only by constructing an intricate and complex institution which detaches and isolates their consciences from the ultimate solution.

Having rendered unto judges an objectivity that is a form of subjectivity, and unto scientists an objectivity predicated upon the guaranteed presence of the object, we can now locate the second feature that common sense surreptitiously displaces from the realm of law to the realm of science, namely, the ability to have the last word. The invention of the role of the expert has allowed two quite opposing functions to be confused, because it requires that scientists, having been diverted from their roles, occupy the throne of supreme court judges, cloaking their testimony in the incontrovertible authority of the facts as judged (*res judicata*). But there is a difference between expert and researcher.³⁰ For the latter, there is no such thing as the authority of science 'as judged', and if she were to come across a set of propositions that the current, fragile, state of scientific controversy had made unquestionable, what would she do? Why, of course, she would immediately question them! She would return to her laboratory, carry out new experiments, re-open the black box that her colleagues had just sealed closed, change the protocols, or, if she herself shared their conviction, she would use this guaranteed output to construct a new experiment and to engender new facts. In science, incontrovertibility is always the high point of a movement by which the work of information/transformation is continually renewed. When discussion comes to an end, it does so only so as to inaugurate a new phase of intense discussion about entities which have only recently come into existence. When the expert scientist is given the power to decide or not decide, he is lent the regalia of a mode of sovereignty that belongs exclusively to law.

This confusion would be especially harmful because what the judges call 'having the last word' resembles neither the authority of the expert

the power to grant the experimenter the power to speak in their names' (at p. 102) (see also Isabelle Stengers, *The Invention of Modern Science* (University of Minnesota Press, 2000).

³⁰ For a recent presentation of the difference, see Michel Callon, Pierre Lascoumes *et al.*, *Agir dans un monde incertain: essai sur la démocratie technique* (Le Seuil, Paris, 2001); see also Sheila Jasanoff, *The Fifth Branch: Science Advisers as Policymakers* (Harvard University Press, Cambridge, MA, 1990).

nor the scientists' endless renewal of discussion.³¹ Indeed, however forceful the authority of *res judicata* in law, what is involved is always, as lawyers say, the 'exhaustion' of the available channels of appeal. The end of a case never reaches a limit that is any more grandiose than this particular kind of exhaustion: 'it's reported in the Lebon', 'the issue has been decided', 'as the law now stands', 'unless the European Court of Human Rights rules to the contrary'. Nothing said in the Conseil d'Etat is quite as juicy, or as sublime, as these sorts of expression. When they reach the 'end' of a hearing, judges take care to ensure that this ending is not clothed in the grandiose forms of Incontrovertibility. When Roman lawyers intoned the celebrated adage '*res judicata pro veritate habetur*', they were declaring that what had been decided should be taken as the truth, which means, precisely, that it should in no way be confused with the truth. The esteemed role of the expert corresponds neither to the model of scientific research, which re-opens a discussion that had been closed too quickly, nor that of the judge, because the latter demands of closure nothing more transcendent than a simple end to the discussion. This kind of immanence is a modest, constructive, or even constructivist solution: given that there is no one above us, and that the case is simply stopped by the decision which in French is precisely called an *arrêt*, that is, a stop: that which we know without engaging in further discussion, we know because, quite simply, we have exhausted the discussion. There is no further appeal. Full stop.

It might be said that in this respect judges offer to scientists what epistemologists have described as science's nightmare: the example of a mode of unfettered arbitrariness in which a closed assembly decides, without reference to any external arbiter, with no tools other than words, and by simple consensus, what should be held as the truth. On that basis, they would be entirely free to call a cat a dog, to consider a slave a free man, to say that a contractual clause was a separate agreement, or to extract from silent texts a set of 'general principles of law' whose writing no one had ever witnessed; in short, to exercise all the prerogatives of the technique of *fictio legis* which, by means of 'praetorian glosses', ensured that the citizenry mistook bladders for lanterns.³²

³¹ For a marvellous example see Michael Lynch and Ruth McNally, 'Science, Common Sense and Common Law: Courtroom Inquiries and the Public Understanding of Science' (1999) 13(2) *Social Epistemology* 183.

³² But *fictio* has in law a very precise meaning, see Yan Thomas, '*Fictio Legis*: l'empire de la fiction romaine et ses limites médiévales' (1995) 21 *Droits* 17.

Clearly, nothing could be more disturbing from the point of scientists, who are concerned to build as much reality as possible into their statements, than this capacity to invent everything anew. One can see in this model the famous notion of 'social construction', a spectre summoned up by sociologists so as to scare epistemologists by threatening that all quests for the truth end up in a locked room where a secret ballot is held to decide what will henceforth *count* as the truth. But, in the same way as an expert witness has nothing in common with real scientific work, so social construction manufactured behind closed doors has nothing in common with real legal elaboration.

Once again, the advantages of not confusing the distinct features of these quite specific forms of enunciation become clear. Just as scientists can indulge in all kinds of moods, being as passionate or partial as they like, because the laboratory object occupies the same place as a legal text or a binding precedent, so, by contrast, lawyers can indulge a power to invent fictions, and to introduce what they call 'constructive solutions', because, precisely, in making their decisions they have no object, or no objectivity, to deal with. What is so shocking about the fantasmatic image of 'social construction' is that it applies a model of legal decision-making to scientific objects: in which case, of course the special prowess of adjudication does indeed turn into a cynical nightmare of arbitrariness. But the point is precisely to avoid confusing the two things. Indeed, my attempt at clarification seeks to remove from science the power to have the last word which was entrusted to it in error or through cowardice, and to encourage it to resume the construction of those referential chains whose continual movement loads them with information that is more and more reliable, more and more precise, and more and more capable of sustaining discussion. On the other hand, if legal enunciation is relieved of the impossible task of transporting information and uttering the truth, it is left free to circulate through the fine channels of that very particular kind of vehicle, which is the only one capable of freighting and transporting those priceless commodities that are known as '*moyens*', 'qualifications', 'obligations', and 'decisions'.

It would, however, be quite wrong to draw a contrast between science, set against an intangible reality that resists all attempts to manipulate it, and which cannot be twisted in accordance with our desires, and law, which, because it consists only in words and consensus interpretations reached in a closed hearing, can say whatever it likes so long

as it is authorised to have the last word.³³ Law has its own resistance, its own solidity, rigidity, or positivity, and even its own objectivity, which, despite the admission that it is constructed, has no need to be envious of scientific realism. We know that scientists speak the truth about phenomena precisely because they can manipulate, transform, and test them in thousands of ways, and because they can use experimental techniques to insinuate themselves into the most intimate details of their material existence. It is precisely because reality is not intangible, and because it bears no relation to the 'matters of fact' imagined by epistemology, that science can speak quite faithfully about reality. It is therefore pointless to distinguish science and law in terms of the differences between objects and signs, hard and soft, unquestionable and arbitrary. If *res judicata* are not to be (mis)taken for the truth, the point is not that this justifies some form of cynicism, but that it has better things to do than mimic or approximate to the truth: it has to produce justice, and declare the law, in accordance with the existing state of the texts, taking into account the precedent, with no arbiter other than the judges, who have no one to judge for them.

It might be said that this simply revives the old distinction between judgments of fact and judgments of value. For my part, I would be more inclined to see this distinction itself as the echo of something invented by the great seventeenth century English philosophers, who, for reasons which were largely political, inappropriately crossed law with the emerging laboratory sciences. Indeed, it is strange to note that the scenography of empiricism borrows the definition of a fact from judges so as to apply it to science, whereas, as we have seen, it in no way defines the articulation between researchers and their objects. In the empiricists' imagination, raw facts, the essential 'data' or 'sense data', have the peculiar virtue of being both insignificant and incontrovertible. They constitute the raw material of judgment, which gets under way by ordering them, associating and combining them in the human mind. But isn't this precisely the relationship that lawyers have to the facts, which have to be defined as quickly as possible so as to move

³³ This is the weakness of the term 'legitimate' overused by sociologists to misunderstand law and society, see Olivier Favereau, *L'économie du sociologue ou penser (l'orthodoxie) à partir de Pierre Bourdieu: le travail sociologique de Pierre Bourdieu – dettes et critiques*. Edition revue et augmentée Bernard Lahire (La Découverte, Paris, 2001), pp. 255–314.

on to what really matters, namely, processes of qualification or scholarly explanation? But in what laboratory would one find a researcher dealing with simple 'sense data'? Only an empiricist could imagine that the articulation between a scientific article and what it describes could be anything like this extravagant division between that which is questionable and that which is unquestionable. Once it is recognised that the very definition of 'raw facts' is a strange hybrid of law and science, it becomes easier to understand how the virtues of distance, indifference, detachment, or disinterestedness, which characterise the work of judges, came to migrate to the scientist, or to the quite improbable and highly politicised historical figure of the 'expert', who has the capacity to bring discussion to an end by arrogating to himself the power to bind or unbind by delegating the issue to 'matters of fact'. This is a deviation from the careful work of scientific research, but it is an even greater derailing of law, which only allowed itself to bring discussion to an end precisely because it could *not* delegate the task of ending a dispute to any authority other than its own fragile immanence. By means of this spectacular manoeuvre, empiricism led us to confound the virtues of politics, science, and law in a Gordian knot, thereby turning those virtues into vices.

The seventeenth century representation of matters of fact was based on the suppression of something which is now being brought to our attention more and more insistently, namely the common etymology that links things and cases, causes to causes, thing and *Ding*.³⁴ By a strange inversion, and as a result of being bombarded by things that are alien to the social world, scientific objects have once again become cases that are subject to common discussion in a Parliament or a courtroom. Having emerged from the courtroom, or at least from those extraordinary forums which preceded courts, the two etymological genealogies had gradually become separated by the supposed distinction between the arbitrary discussions of judges and the supreme tribunal of experts speaking in the name of incontrovertible facts, beyond any human affair, trial, or plea. But, having extended laboratory life to all of our collective existence, it seems that, as the project of modernism gradually exhausts itself, there is now no fact that is not also a cause or a claim. The thing has once again become a Thing or a *Ding*. That is

³⁴ The earliest Icelandic Parliament was, and is still, called a Thing. For a full treatment of the argument, see Bruno Latour, *Politics of Nature: How to Bring the Sciences into Democracy* (Harvard University Press, Cambridge, MA, 2004).

why it is all the more important, now that objects have been restored to their common origins, not to confuse the characters of science and law. Clearly, in order to deal with states of affairs that are so intermeshed, it is hopeless to characterise the work of scientists in terms of what was nothing more than the usurpation of legal or political authority, just as it is impossible to demand that lawyers replace scientific enunciation. In drawing the distinction between incontrovertible facts and negotiable values, modernism referred to the nature of objects, without paying proper attention to the different tasks of the scientists and lawyers, but that distinction should now be made differently, by reference to the nature of the two jobs, which address causes, or cases, in common. It is now essential that science should not be asked to judge, and that law should not be asked to pronounce truth.

That would be to confuse the last of the features which distinguishes these two modes of attachment: whereas scientific research can engage with turbulent or violent history of innovation and controversy, a history that is continually being renewed, law has a homeostatic quality which is produced by the obligation to keep the fragile tissue of rules and texts intact, and to ensure that one is understood by everyone at all times. A premium is put on legal predictability (*sécurité juridique*) but there is no such thing as scientific security. Scientists, once they have added their own particular pebble to the edifice of a discipline, might well see themselves in the role of Samson shaking the columns of the temple, overturning paradigms, overthrowing common sense, and bankrupting old theories. Lawyers, even when they make an especially daring argument for overturning established precedents, have to secure the integrity of the legal edifice, continuity in the exercise of power, and smoothness in the application of the law. Science can tolerate gaps, but the law has to be seamless. Science can draw on lively controversy, but the law has to restore an equilibrium. Although one might speak admiringly of 'revolutionary science', 'revolutionary laws' have always been as terrifying as courts with emergency powers. As one of my interviewees suggested, 'Our first concern is for stability; we have to plough a furrow that is as straight and as deep as possible, because litigants expect coherence and transparency'. All those aspects of law that common sense finds so irritating – its tardiness, its taste for tradition, its occasionally reactionary attitudes – are essential to law's functioning. Like the Fates, the law holds in its hand the fine thread of the whole set of judgments, texts, and precedents, which cannot be broken without lapsing into a denial of justice. Whereas the scientist can satisfy herself with partial

information because she knows that the power of her instruments will enable other scientists, at some point in the future, to refine the science and extend the chains of reference, a judge has to ensure that holes are repaired immediately, that tears are darned without delay, gaps filled, and cases resolved. Whereas the fabric of science extends everywhere but leaves a lot of voids, rather like a lace cloth, the fabric of law has to cover everything completely and seamlessly.

CHAPTER FOUR

LEGAL FABRICATIONS AND THE CASE OF 'CULTURAL PROPERTY'

Tim Murphy

Why have scholars in a range of disciplines, far from letting go of law, returned to it, in some cases¹ with a vengeance? Have not all their disciplinary protocols and presuppositions taught them that law no longer plays the role in human affairs it once did, even as, at the same time, we are surrounded by and engulfed in it? One once took it more or less for granted that the persistence of jural perspectives in social anthropology was a problem, not a good thing, and that the rather legalistic anthropology of Max Gluckman, for example (not that its legalism was appreciated at the time in his own university's Law Faculty),² was problematic and needed to be displaced.

But perhaps the intellectual development in motion here is not a re-legalisation of anthropology but an importation of anthropology into the rather peculiar because ancient discipline of law.³ Yet it is not at all clear what this might mean or how it might be achieved, if at all. An anthropology of legal processes like trials, legal representation, the

¹ See generally Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg (trans.), Polity, Oxford, 1996), in which social-theoretical positions and arguments function at best as premises for an intervention in debates in liberal legal and political theory conducted largely on the latter's terms.

² Max Gluckman offered to give some lectures to the law students at Manchester University which was indignantly rejected: source, personal communication from the late Harry Street.

³ The rise in the salience of alternative dispute resolution (ADR) is a symptom of this in one way.

construction of victims and offenders, sentencing, even the mundane business of bailiffs and police (distress, arrest, sequestration, imprisonment) can be approached anthropologically, in parallel no doubt to sociological and economic approaches to these phenomena. But this is not a reversible relationship so far as law is concerned, if we want to say anything more than that to conduct research in some country you need a permit from a Ministry along with your passport, visa, and so on. These 'legal documents' do not construct you as a person or as a researcher – they do, at best, all and only what they claim to do: allow you to pass, to move, to be free to do what you want to do, for reasons you, your supervisor, or your university or funding agency have selected. The university system constructs the category of 'researcher'; the legal system has at best to decide whether or not to 'recognise' it.

The world of lawyers is a world of rules rather than regularities, to use Bourdieu's distinction, even when, in fact, their rules turn out, on close inspection, to be mere regularities of a certain kind (regularities in, rather than rules of, decision-making, for example).⁴ But the perspectival achievement of modern social anthropology was to insist that this matter of both rules and regularities had to be seen from the bottom-up rather than from the top-down. The problem with jural perspectives was always that they started from the top, from written or unwritten statements emanating from elites, big men, and so on. These said little about the 'real' processual dynamics of life on the ground – life as lived, experience as experienced – and the forces which shaped these dynamics and the vectors which transmitted these forces.

Part of the answer to the question with which this chapter began might be found in the much-retained-to Kantian theme of the enigma of judgement which eludes us still. Law, along with art criticism and the more ridiculous domains of moral philosophy, are zones in which modern judgement is rooted (the Kantian schema is troubled from the start by the separation of practical reason from the aesthetic, and this problem haunts his most ambitious successors, up to and very much including Habermas). But as we are now supposed to think, judgement and the enigma beneath it is in fact (as if one can write 'in fact' anymore) everywhere. Yet law is one of the few locations in modern societies where the process of judgement is successfully institutionalised in an effective way

⁴ See generally Pierre Bourdieu, *Outline of a Theory of Practice* (Richard Nice (trans.), Cambridge University Press, Cambridge, 1977).

and explicitly thematised as such.⁵ (Common lawyers, of course, are often content to call this an 'art' of judgement and are just as often disturbed if the word 'science' is substituted for 'art'.) Indeed, lawyers have hallmarked a distinctive spelling for the word and made it signify not just a process but also an entity – the 'judgment'. Of course 'judgement' occurs in other contexts: university applications, discretionary benefits from the DSS, job applications. These are decision fields involving (supposedly) the use of 'judgement' in relation to individuals and using (in principle) general criteria; they do not generate 'judgments' in the way law or possibly art criticism do.

The easy question is this: a group of judges says that the word 'family' can include a same-sex couple and it is headlines in all the papers the following day;⁶ have either persons or things or even social relations been made or, as the question is usually put, been 'changed'? The question is easy because we know more or less that the answer is negative. But the underlying question is: what is it that law does? What is it that its technologies fashion? Does law 'make' anything?

Technologies are about making things. To be made, in the modern world, is to be (a) mass-produced, and/or (b) to be positivised. These two processes are not the same but they overlap. Even if the main focus is on things rather than persons,⁷ it is not unreasonable to claim that these are the two key respects in which people as well as things are made in the modern world. Individualised gene therapy, if it ever happens, confirms rather than refutes such a claim. Whatever we should say juridical technologies make, the question I wish to consider is in what sense if any they make things which are mass-produced or truths or realities which are positivised. In the light of this more general discussion, I then wish to address some remarks to the question of cultural property and law's 'role' in the emergence of this phenomenon.

MASS-PRODUCTION

Mass-production means that things are produced according to a type or pattern or model. While this is not exactly new – mass-production

⁵ Hannah Arendt did not live to complete her reflections on this topic: see Hannah Arendt, *The Life of the Mind* (Harcourt Brace, San Diego, 1978), pp. 241–72.

⁶ *Fitzpatrick (A.P.) v. Sterling Housing Association Ltd* [1999] 2 WLR 225.

⁷ If this is a stable distinction, which it almost certainly is not: see Bruno Latour's discussion of hybrids in, e.g., Bruno Latour, *We Have Never Been Modern* (Harvard University Press, Cambridge, MA, 1993).

of a certain kind was clearly not unknown in the ancient world – the modern situation is one in which production transcends copying and becomes exact reproduction: instead of mimesis, replication, which is different.⁸ Such mass-production, via the operations of Walmart *et al.*, now extends to much of cultivated nature⁹ and to the production of the truth of life itself. Thus in relation to the rise of genetic engineering, Karin Knorr-Cetina comments:

The engineering metaphor . . . exclusively emphasizes the constructionist aspects of laboratory techniques like DNA cloning, with hopes for wider applicability in agriculture and the health sciences. It tells us little about the ontological makeup, in the laboratory, of organisms in production units, of their instalment within cycles of reproduction in factories of transgenics, or of the notion of a ‘substance’ as pure, uniform, mass-produced material of restricted origin . . . [M]olecular biology bases its success on the fusion of two ancient categories, life and machines, which, in the history of biology, have long been separated . . . Its success is grounded on the exploitation of the *mechanical infrastructures of life* and the *re-entry* of these infrastructures into research – as machines that can be used to mass-produce certain materials and, through these materials, can be used to clarify the infrastructures themselves.¹⁰

In such circumstances, uniqueness and originality can emerge as values, values which would have seemed strange to most elites in most societies, never mind to most populations taken as a whole.¹¹ So would the new-found allure of misshapen carrots or even ‘wholemeal’ bread.

⁸ The conventional citation at this point has for a long time been to Benjamin, ‘The Work of Art in the Age of Mechanical Reproduction’ in Walter Benjamin, *Illuminations* (Hannah Arendt (ed.), Harry Zohn (trans.), Fontana, London, 1973), pp. 219–54. For a more contemporary discussion see Giorgio Agamben, *The Man Without Content* (Georgia Albert (trans.), Stanford University Press, California 1999), ch. 10.

⁹ Jeremy Rifkin, *The Age of Access: The New Culture of Hypercapitalism, Where All of Life is a Paid-For Experience* (Tarcher Publishers, Los Angeles, 2000), p. 58 *et seq.* on mass-production of concepts now displacing mass-production of physical ‘things’. See also George Ritzer, *The McDonaldization of Society* (2nd edn, Sage, London, 1996).

¹⁰ Karin Knorr Cetina, *Epistemic Cultures* (Harvard University Press, Cambridge, MA, 1999), pp. 157–8.

¹¹ See Benjamin, *Illuminations*; Agamben, *The Man Without Content*; and the arguments encircling Kant’s aesthetics. See also Thierry de Duve, *Kant after Duchamp* (MIT, Cambridge, MA, 1996).

POSITIVISATION

Positivation means that realities and truths or facticities are assembled and given outside (individual) experience. Today, the purest positivities are results generated by machines, e.g. the 'results' of n-person iterated games.¹² Whether or not the production of these results is 'humanly' possible (i.e. whether a 'real' human being could do these calculations manually and mentally), it suffices to say that the resource commitment to engage in this kind of activity seems excessive to the outcome until it can be produced by machine, and that once this technological capacity is achieved, it then becomes routine to regard the outcomes as experimental ones, in the sense that the outcome cannot be predicted from the starting point of the initial inputs.¹³ (Whether this is really so is another matter, as, of course, is the question of reality itself.)

These two dimensions criss-cross each other not least in that mass-production creates conditions in which it is meaningful to positivise consumer preferences, in general or on an individualised basis; mass-production also makes it possible to produce a culture as an actually existing – observable, picturable – thing which has a facticity independent of its 'original' producers. And as some analysts of late or post-modernity see matters, cultural production is an increasingly central component of the emergent weightless economy which characterises the new global order.¹⁴

Commentators and critics endeavouring to come to terms with or condemn these developments (or at least their precursors) in the nineteenth century singled out a shift from individualism to collectivism, mechanical to organic solidarity, *gemeinschaft* to *gesellschaft* (natural to rational will), status to contract, and so on. Whether these divergent diagnoses of what was 'new' about society and the world at that time

¹² Robert Axelrod, *The Complexity of Cooperation: Agent-based Models of Competition and Collaboration* (Princeton University Press, New Jersey, 1997); also John H. Holland, *Hidden Order: How Adaption Builds Complexity* (Addison-Wesley, Boston, 1995) on genetic algorithms.

¹³ See Axelrod, *The Complexity of Cooperation*; see also Mary S. Morgan and Margaret Morrison (eds.), *Models as Mediators: Perspectives on Natural and Social Science* (Cambridge University Press, Cambridge, 1999); Mitchel Resnick, *Turtles, Termites, and Traffic Jams* (MIT, Cambridge, MA, 1997); John L. Casti, *Would-Be Worlds: How Simulation is Changing the Frontiers of Science* (Wiley, New York, 1997).

¹⁴ See, e.g., Rifkin, *The Age of Access*.

were correct (they could not all have been all at the same time),¹⁵ everything has ‘moved on’ since then. Those who stressed ‘individualism’ as the signature of modernity were in many ways, we can now see, completely wrong. Whatever mass-production and positivisation imply, they imply the making of a world which transcends the normative and cognitive horizons and capacities and experiences of ‘individuals’. They signal the distinction between the ‘individual’ and the ‘aggregate’, and they point to the ‘triumph’ of the aggregate over the individual. To echo Thomas Schelling, macro-behaviour not micro-motives is what matters, though we can all argue about how micro-motives are generated and how important they are.¹⁶

So: what conceptuality is appropriate for a world or a segment of it which has achieved a regime of both mass-production and mass-consumption (and in Habermas what one could only call a subterranean image of mass ‘discussion’, at least as an ideal to be aimed for), to orchestrate almost all of the essentials which characterise the framework in which the relation between persons and things now takes place?

This is merely to table the question. Alongside it we must also look more closely at the very idea of juridical technologies.

JURIDICAL TECHNOLOGIES

If the term ‘technologies’ is to be more than a fashionable metaphor, we need to take account, very concretely, of the possibilities and limits of the machinery which the law has at its disposal and in the light of that the precise character of the ‘product’ which it ‘makes’. As important here is to pay attention to what kinds of things (including persons here) ‘the law’ does not make and cannot make because it is not there for such purposes and does not possess such a production capacity in any event.

At their most primordial, juridical technologies concern the fabrication of appropriate settings in which juridical activities can be conducted. Itinerant justice in ad hoc settings is common enough, but the development of permanent locations permits focused attention to

¹⁵ They understandably tended to be presented in terms of polar opposites. Much more subtle analysis is required than these schemes offered to show how collectivism and individualism, for example, might amount to two different moments of the same development.

¹⁶ cf. Thomas A. Smith, ‘Nonlinear Dynamics and the Micro-Macro Bridge’ in Raymond A. Eve and Sara Horsefall (eds.), *Chaos Complexity and Sociology: Myths, Models, and Theories* (Sage, London, 1997), p. 52.

be given to the design of the courtroom, the organisation of archives and files, and so on. Associated technologies are: the construction and design of prisons, technologies for the collection of debt and enforcement more generally, like the sequestration of assets; even taxation can be seen in this light. It is also in these contexts that one can most readily observe the use of or failure to use 'new' technologies – in contemporary terms, the electronic tagging of the convicted, the use of CCTV cameras, the use of new technologies for the presentation of evidence in court, etc. The fact that ownership of these technologies or their deployment is not particularly or at all legal or juridical is not so important. It is perhaps time, as much work in the sociology of scientific knowledge (SSK) has shown, to dispense with those aids to thought like the 'sine qua non' and the techniques of 'ceteris paribus'.

The things made in this way are in effect the vehicles through which law become visible, even real, in a society. In the absence of these means of making law real, it has an ethereal, almost ideological quality. This is perhaps one reason why the status and significance of international and transnational public law has long been problematic. For some it was essentially a law of contracts between states, which worked to the extent that it did through a principle of reciprocity and which took material form in ritualised signing ceremonies and in the written documents placed at the centre of such rituals and in chests, filing cabinets, bound volumes or display cabinets thereafter. This limited view is now largely discredited in the ideology peddled by academic lawyers and in the rhetoric of Western politicians (most of the time, at least), though this does not mean that the traditional view is wrong. In some areas, the establishment 'under' international law of international tribunals is now the vogue. But as with the project for an International Criminal Court, it runs up against the question of the value of an international treaty or jurisdiction if the United States is not on board. In the conditions of the *pax Americana*, the question whether international law is anything other than US foreign policy by other means returns.¹⁷

The law makes frameworks for decision-making. In common law jurisdictions, there is a marked tendency for these frameworks to be discernible only after the fact, so that they tend to be called 'rationalisations' of decisions already reached in the courts produced by academic and other commentators positioned in a reactive or glossatorial role.

¹⁷ See generally Michael Hardt and Antonio Negri, *Empire* (Harvard University Press, Cambridge, MA, 2000).

The law evolves through decisions, and legal science advances through reflection upon this material. Legislative material, from this perspective and starting point, either continues or interrupts what are, for current legal scholarship, such basic procedures and basic moves.

What is obviously made through these processes are 'systems' of classification. These systems may not be very systematic or very robust, but they are there all the same. Mobile grids are set in motion or, more exactly, are in motion all the time – there is no beginning and no reason to suppose an end to this kind of process – and these grids and their shifting contents are what the law and its essential technologies of reports, indexes, computer-based data storage and retrieval makes. These grid formations and classificatory schemes feed back into the processes of adjudication and legislating and law teaching via textbooks, reading lists, journal articles, and the World Wide Web. So we can say that one answer to the question what does the law make is that it makes grids – ways of organising what through its epistemic filters it considers to be facts, including facts about the state of the law.

Legal frameworks for decision-making require us to distinguish in some way between legislative and adjudicative spaces and roles. The former is concerned with the problem of the translation of the political and perhaps more importantly the administrative into the legal, and I use the word 'translation' advisedly. The reference point for legislative action is the output and consequences of adjudicative activity, i.e. the draftsman has to ask what 'the law' (i.e. the courts) would make of anything he writes in his legislative text, not because litigation is always anticipated (though many assume that this is more likely now than it used to be) but for the more basic reason that this is the reference point, the audience, the location of reader-response which may or may not feed back into the conditions of initial textual production. In other words, we need to be alert to the complexities in play when we take it for granted that the law makes legislative texts.

What exactly goes on in laboratories, whether or not and in what sense knowledge might be fabricated in such places, must be left to those like Latour who have studied such questions in depth.¹⁸ I can only insist

¹⁸ Bruno Latour, *Laboratory Life: The Construction of Scientific Facts* (Sage, London, 1979); Bruno Latour, *Pandora's Hope: Essays on the Reality of Science Studies* (Harvard University Press, Cambridge, MA, 1999); Isabelle Stengers, *Power and Invention: Situating Science* (Paul Bains (trans.), University of Minnesota Press, 1997).

on the most banal observation: the law has no laboratories. It equally has no factories¹⁹ (I will return to this issue in a few moments). As Luhmann puts it: 'The law cannot be used as a machine for the investigation of truths, or for the discovery of intelligent solutions to problems'.²⁰

WHAT FOLLOWS FROM THIS?

The main thing which follows is that law is thereby limited in its fabrication possibilities. Legislation is passed; yet any sensible legislators will have in mind matters of delivery, which tend to mean administrative resources, competences, and capacities. In such a legislative environment (which is modern, because there was a time when it would be more true to say that legislation was mainly a matter of public statements of the aspirations of rulers) perceptions of possibilities of what administrative capacity can deliver feed back into the decision-making process itself. No longer just a matter of 'if it's not broke don't fix it', this protocol suggests that 'if it can't be done don't do it'. Politicians, of course, do not always follow this precept, which is not law itself but just a lesson from the past, a matter of experience, a maxim of modern prudence.

Lawyers (whether academics or practitioners, though it matters more of course to the academics) have available to them a defensive strategy to preserve their epistemic status: they focus on constructivist tendencies in the sociology and philosophy of science and say 'So law is no different from science and our epistemic guarantees are no less fragile than theirs'. No less fragile than those upon which the whole world, for good or bad, rests. But it is not very intelligent to allow debates about the 'social construction of knowledge' to operate as an alibi when the question is the assessment of the epistemic products and achievements of legal systems.

It is commonly supposed that legal recognition of something 'makes a difference'. Making a difference is not the same as making a thing or a person; making a difference is a matter of incision. It may be that in some post-epistemologically orchestrated epistemologies like

¹⁹ In England at the moment, case management and all that goes with it may modify the accuracy of these observations. Decisions are now being manufactured in bulk (after a fashion) rather than just allowed to happen on an *alea jacta est* basis (as-and-when rather than just-in-time). On this point see further below.

²⁰ Niklas Luhmann, *Das Recht der Gesellschaft* (Suhrkamp, Frankfurt, 1995), p. 419.

Luhmann's²¹ this distinction-making is all that occurs, anywhere, anyplace, when what is at stake is what is true or what is right or what is beautiful (worthy of 'admiration'). Whatever standpoint we adopt on these foundational questions, the question of the production of the factual remains, and all the discourses and analyses which stress the arbitrariness or contingency of what results from the making of the factual cannot overcome or surpass the hard reality of the sentiment that what is just is, while knowing, in the background as it were, that what is has for the most part been made, or, more legalistically, either invented or discovered (but nothing, or very little, despite the fictions of the law, is just discovered anymore, other than fish in deep seas and insects in rain forests, whether or not it ever was).²²

In modern societies, legal systems are positioned to make decisions using the distinction between right and wrong or, more precisely, lawful and unlawful. The principal, and certainly the most tangible, 'product' of the law is no more and no less than providing additional resources for further decision-making. It is less a case of the law is the law, more a matter of the law makes the law. Decisions create the possibility for further decisions but do not make anything happen in the world.²³

These decisions are supported by and made 'real' by a range of ancillary technologies, which are in fact as constitutive of 'the law' as are the refined thoughts of jurists. Some of these are about enabling decisions to be made; others are about making decisions effective. In combination, one could say that they are about making decisions *happen*. They enable decisions to intervene in the world. (Which is to say that without them decisions might not occur or might just be ignored.) Courts starved of resources struggle to make decisions; courts operating in hostile political or military environments are ineffective. What is often called a problem of legitimacy can be decomposed into

²¹ See, e.g., Niklas Luhmann, 'The Ecology of Ignorance' in Niklas Luhmann, *Observations on Modernity* (William Whobrey (trans.), Stanford University Press, Palo Alto, 1998).

²² See Knorr-Cetina, *Epistemic Cultures*; Stengers, *Power and Invention*.

²³ Whatever his limitations, Montesquieu recognised this clearly in his characterisation of the nature and limits of judicial power. Clearly, deciding what is right or wrong within institutionalised legal frameworks is not the same as reaching agreement about what is right in an open-ended discussion of interested participants, never mind participants who seek to set aside or veil their interests and talk to each other 'disinterestedly' with the aim of arriving at an agreement.

something at once more complex – in that it has many practical components and elements – and more simple – it is a practical matter, after all.

I now need briefly to reintroduce the themes of mass-production and positivisation mentioned earlier and reconsider them specifically in relation to legal decision-making. We must emphatically set to one side the legal problematisation of legal 'positivism'. That is not what I have in mind here – the link between my position and the 'positivism and its alternatives' debate within legal discourse is at most that legal positivists, I think, both presuppose limited degrees of positivisation already achieved and in some cases dream of more powerful technologies which would unleash the possibility of a purely positive law.

What I wish to stress here is that much of modern law is itself mass-produced and/or positivised. This is unsurprising, because it is quite impossible for the law and specifically its adjudication systems to remain insulated from more general trends in society, whether these are the dissemination of information or even the corrosion of character.²⁴ Moreover, legal applications of technologies emulate or become derivative of other applications: of applications to supermarkets or large financial corporations. Courtrooms were among some of the first public non-ecclesiastical architecture. Modern technologies are usually developed for some other purpose and applied somewhere else.

The mass-production of law occurs quintessentially in the form of the manufacturing of templates for multiple use – standard forms. This is not new; what changes is first the manipulability of the template as well as the reduction in the need for manual copying and the possibilities of error linked to copying; secondly, the medium through which such templates are made available, and one current debate is whether some of these templates will become available, e.g. through the Internet, to the public at large without the need to resort to a lawyer-as-intermediary.

But we are also living in an era of the mass-production of decisions. This is by no means just to say that there are a lot of decisions going

²⁴ Richard Sennett, *The Corrosion of Character: The Personal Consequences of Work in the New Capitalism* (W.W. Norton, New York, 1999); A.T. Kronman, *The Lost Lawyer* (Harvard University Press, Cambridge, MA, 1995); Sol M. Linowitz and Martin Mayer, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* (Johns Hopkins University Press, Baltimore, 1994). See also David Saunders, *Anti-Lawyers: Critics of Law as Heirs of Religion* (Routledge, London, 1997).

on (though there are). It is rather to say that increasingly the policy objective is to transform senior judges into managers and to make it their explicit responsibility to manage in bulk the process of decision-making against the background of performance targets and outcomes which will themselves be externally monitored and measured.²⁵ In this same context, decisions taken in other jurisdictions can seem more relevant than domestic decisions taken in the past.

As to positivisation, in the sense I am using here, it is not just the creation of in effect world-wide databases of decisions, but also the increasing tendency towards forward planning of decision-making and the managerial deployment of judicial personnel on such a basis. The orderly management of decision-making in the aggregate displaces the priority once accorded to getting each individual decision 'right'. 'No price on justice' is a memory – part of our heritage perhaps, but something essentially for the museum. In its place we have the idea of just-in-time justice.

The larger point here is that the mass-production of law and its positivisation is registered in crime statistics, in aggregate numbers of offences and in crime rates which show whether crime, or particular kinds of crime, is rising or falling. This positivisation is applied too to the legal system itself, especially in the form of averages: the cost of this type of trial or that type; the speed (or lack of it) with which the legal system processes different types of business, and so on.²⁶

But all of this turns in the end on non-metaphysical technologies – on operational, organisational, and extractive capacities. There is a familiar jurisprudential distinction between the coercive role of law and its facilitative role. This ignores the intimate and intrinsic connexion between these two facets of law and its *modus operandi*. Moreover, we need to leave to one side all those preoccupations with legitimacy to which such theories are often connected. We are sent off into all manner of unnecessary directions if we wish to insist that being obligated (through (legitimate) law) and being obliged (which conceptually can include through (illegitimate) law) are essentially different, at least for most of society, or, equally, that facilitative law does not rest in the end for its efficacy on the coercive capacities of the machinery of the law.

²⁵ See W.T. Murphy, 'Modernising Justice Inside 'UK plc': Mimesis, De-Differentiation and Colonisation' in Jiri Priban and David Nelken (eds.), *Law's New Boundaries* (Ashgate, London, 2001), pp. 218–48.

²⁶ Ibid.

We need to bear this in mind when we suppose that law is also about 'making a deal'.²⁷

What the law can do is to be understood in terms of what it can organise and exact from persons, and this means things, especially money, but also bodies, or parts of bodies, and lives. Of course, there are also the 'unintended consequences' of what the law does, the things it does in the course of doing or as a result of doing the things which it does, the 'collateral damage' as well as its 'core business'. The main examples are in the field of publicity, whether revelations in the mass media (if the legal material can be reported as a news event) or the disclosure of confidential business information. Alternative dispute resolution is not just about reducing costs.

PROPERTY AND RECOGNITION

Modern lawyers and philosophers are fond of saying that property is not a relation between persons and things but a bundle of rights (this term may or may not itself be refined further in a Hohfeldian or other manner) between people in respect of things. Seen in this way, all property becomes in a sense intangible, in that what is at issue in asserting property rights are rights and obligations recognised or not recognised by the law which is operative for the tribunal in question, be it a tribunal of a 'sovereign' state or of an international or transnational adjudicative forum. Crudely, we start talking about property when these rights and obligations acquire a certain density vis-à-vis other persons. We can use imagery like congealing or clustering in respect of a range of obligations to demarcate property from non-property; but it is a fantasy of one sort or another to assert that the claim to property suggests anything more intimate or less social in the way in which humans are connected to objects or things.

I do not propose to intervene in this directly though I must say that it displays all the vices of analytical philosophy and its pernicious impact upon legal theory in the twentieth century. More interesting is how the distinction between the tangible and the intangible creates all manner of virtualities – of orders of the 'as if' – within law, economy, and society. What is perhaps most crucial is the seemingly generic capacity of the

²⁷ cf. Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, Chicago, 1996).

law to transform obligations into things, which is to say, very firmly, that once this transformation process is undergone, it becomes increasingly possible in operational terms to forget that the 'thing' is in fact a right or an obligation. The clearest modern examples are securitisation and derivatives.

All of this no doubt begs the question of how we are to understand the role of juridical technologies in relation to intangible 'things', notably, in the present context, copyright and patents. The energy of the law might seem to be directed towards the definition of the character and scope of these rights. It may also be supposed that once a copyright or a patent is acquired for a work or a process, then the law has made something. I would rather say that the law's decision on the question 'Can this be patented?' or 'Can there be a copyright in this?' has the potential to unleash other technologies – technologies which rest upon power and money – but a legal decision can often simply contribute, at best, to a bargaining situation and certainly does not determine what will happen next. In both commercial and political contexts, the law is at once a tool to be used and one of many potential hazards in the operational environment. In a global environment, the 'thingness' of copyrights and patents dissolves into questions of jurisdiction, international trade relations, and transnational politico-economic consequences (e.g. the battle over the mass-production of generic substitutes for combination AIDS therapies).

The law is then involved in organising transactions and in the deployment of machinery for the protection or assertion of property rights, rights which its classification systems enable it to identify. Indeed, this is historically a particularly important aspect of law's role 'in' society. But the question is too often posed in the language or conceptuality of recognition, as if this is a simple matter. It would be better to start with processes and machinery.

Take the traditional legal staple of landed property or property in land. The bundle of rights approach has its uses (to lawyers) but it can mislead us if we seek to characterise the role of law here properly. Law invented a range of elaborate mechanisms for dealing with the socially critical questions of the sale and inheritance and leasing of land. We can follow the lawyers and refer to this complex of activities under the generic term 'conveyancing' here. Once all this was done by inscribing words on parchment, then paper. Elaborate protocols were developed. Courts invented sophisticated ways of handling disputes generated either by the meaning of words in these documents or because of

accidents in the 'real world' like deaths.²⁸ At a later stage attempts were made to record this paperwork in registries. Other countries more successfully invented *cadastres*. Now the agenda has shifted to electronic transactions. The main obstacle is the signature.

The land, of course, is still the land, unless it has fallen into the sea or become a lake. It may have been mined, built upon, built upon to such an extent that it becomes a danger to or a target of overflying aircraft. All these changes will most likely have been recorded in legal documents, because in the modern world at least these changes will involve recording risk allocation, insurance, rents and other entitlements, and so on. The efficacy of all this documentation – in whatever medium it was created and/or is currently stored – depends on, for example, the persistence of the overarching territorial state and/or political regime. Mass migrations of peoples following major changes here – partitions of the unpartitioned (India and Pakistan), the creation of new ethnic-based nations (Turkey) or the political abolition and forced appropriation of private property (Eastern Europe) – change the situation, even though the documents remain, and remain unchanged.

These general considerations apply no less in the field of 'culture'. Legislative and adjudicative procedures afford spaces in which collective opinion- and will-formation can unfold in relation to cultural questions. Equally, such questions are generated from outside the law, and if we wish to understand why and through what mechanisms such questions arise we cannot look to the law but need to look elsewhere. Even the embedding within legal and political discourse of such fine principles as equal respect and equal treatment do not explain the rise of cultural property; at best, they are symptomatic of a certain recognition or resonance within law and politics of demands originating elsewhere, but which may have discursive effects, once such recognition occurs, in that they may affect the way in which demands are formulated and claims are orchestrated. (I elaborate below on further linkages between respect and recognition.)

Once such claims are 'allowed' to resonate within legislative and adjudicative processes, successful claims or demands can assert a formal legitimacy in the society in question (whether local, regional, national, or international). That is, these claims and their enforcement

²⁸ See generally W.T. Murphy and Simon Roberts, *Understanding Property Law* (3rd edn, Sweet and Maxwell, London, 1998).

and implementation are valid because they have been duly recognised by due processes of law, and a higher-order principle has already been recognised in society that legally decided-upon claims are to be respected as legitimate. Unfortunately, since political majorities are often assembled on slender threads, and since the output of adjudicative bodies seems contingent on the dispositions of the individuals composing them (and those providing the necessary economic support), such legitimacy claims are themselves fairly fragile, and principles of suspicion engulf not only the substantive decision, and the formal legitimacy claim, but also the higher-order principles on which such formal claims inevitably rest.²⁹ Indeed, to the extent that the theme of cultural property seems to play with the underpinnings of both individual and collective identities, it can be supposed that the achievement of stable solutions by means of the mechanisms of law and politics and which are articulated in these languages is especially difficult and often impossible.

Legal recognition does not make or protect or save or conserve cultures. The most it can do is to authorise others to do so or destroy them by, for example, allowing developers to proceed with development. The law cannot then follow through and ensure that they do so. It lacks the capacity for this. So, for example, the recognition of native title through adjudicative and legislative mechanisms in Australia cannot and does not determine the 'preservation' of Aboriginal cultures. At least in the global context of a market, capitalist political economy, legal recognition of claims in the form of rights of one kind or another cannot prevent these rights being traded or cashed in, transmuted into other benefits which hold out more attractions to those involved, whether these attractions are immediate or more medium-term.

²⁹ Consider, e.g., this discussion of the Australian native title story: 'A preferable course of action [to *Mabo*] might have been to rethink what is meant by "property" in order to recognise the social, political, and cultural aspects of "property". The traditional liberal notion of property is no longer relevant to Australian society (assuming it ever was). Furthermore, property law remains rooted to structures of a society that no longer exists. The rigid rules of property law have increasingly little relevance to current structures, and have virtually no relevance to Aboriginal peoples and their traditional relationships with the land'. Shaunnagh Dorsett, 'Land Law and Dispossession: Indigenous Rights to Land in Australia' in John Dewar and Susan Bright (eds.), *Land Law, Themes and Perspectives* (Oxford University Press, Oxford, 1998), p. 298. I cite this merely as an example of the sort of position increasingly adopted by academic commentators and others.

In this sense there is a 'purity' about legal recognition (if not about the demand for it). This is captured in the kinds of terms used to characterise it – symbolic, ideological.³⁰ These signal that the law and its products are at once real and unreal. This is why the law can change more or more rapidly than society or the world itself. An example is the 'legal' recognition of foreign governments, e.g. China/Taiwan. Not 'just' a political matter, the legal dimension had specific legal consequences determining whether or not a particular state existed in the eyes of the law of other states.³¹ The long and tortuous history of marriage and its dissolution is similar: the law did not make conjugality but drew symbolic distinctions. People make illegal contracts, i.e. contracts not recognised by the law. People's legal names may not be the names they use. Whether the law should embrace or defer to public opinion (and whether the law has 'sensors' enabling it to ascertain what such opinion 'is') does not alter this.

On close inspection, recognition turns out to be one of the principal modes of observation employed by legal systems. *Locus standi*, evidence, arguments, precedents (which courts' decisions 'count' for example, and/or what 'weight' they have) and analogies – all these are matters of legal recognition. The technology of recognition is not unique to the law although in other locations where it is encountered in a strong form (e.g. precedence)³² it might be claimed that we have something juridical in character and effect. Although it cannot be explored further here, this kind of recognition, I would claim, is quite different from what occurs in factories and laboratories.³³

The claim is sometimes advanced more or less explicitly that law is one of the most important, or the most institutionalised, way in which the features of society are apprehended in thought. Durkheim in *The Division of Labour* provides a good example. But recognition as law's main technology of observation suggests something else – while the term 'recognition' itself confuses as much as it clarifies.

³⁰ cf. The classic study by Howard S. Becker, *Outsiders: Studies in the Sociology of Deviance* (Macmillan USA, New Jersey, 1982) on the Marihuana Tax Act.

³¹ The fact that a state did not exist in the eyes of the law of another state did not of course mean that it did not exist.

³² cf. Charles Loyseau, *A Treatise of Orders and Plain Dignities* [1610] (Howell A. Lloyd (ed.), Cambridge University Press, Cambridge, 1994).

³³ Again, perhaps I exaggerate: the HIV virus has not been isolated in laboratories but therapies and public health policies have been developed on the basis that nonetheless the virus exists.

Recognition suggests something external which is there to be seen (or not). In reality, recognition is a technology of inclusion and exclusion, of distinction-making, of 'allowing in' or of 'keeping out'. Technologically this is very simple and very old. Frequently, it is not an explicit question: decisions are made on the basis of decisions about recognition already in place ('the law/the court does not recognise etc'); sometimes recognition is explicitly at issue (i.e. it provides the topic) but it is resolved as a matter of argument rather than research. This at best involves a kind of methodologically promiscuous research by advocates or investigators.

In recent years, however, the topic of recognition has come to be coupled with something less technologically focused – the notions of equal respect and dignity. The 'politics of recognition' now retrieves a debate around the claim that all should be treated equally.³⁴ 'All' can refer to 'persons' and thus assert genealogical support in the unfolding of the immanent logic of 'equality before the law'. This also provides an entry point for cultures, which can function as quasi-persons within some discursive configurations, and thus give shape to assertions and claims founded on the right to equal respect. Indeed, without such equal treatment of cultures, it can be argued, the equality of persons itself is undermined, to the extent that persons are folded into cultures and cultures into persons. One of the paradoxes which arises here is that it is precisely this same gateway into the law through which the discourse of universal human rights has passed, more or less at the same time, and the complex and often tensional relationship between culture and human rights is a striking feature of our times.

THE LEGAL TECHNOLOGY OF CULTURAL RECOGNITION: THE DISCURSIVE STRUCTURE AND THEMATIC CONTENT OF CULTURAL PROPERTY CLAIMS

Once the law or God (a bit of both really) 'made' an heir – juridical categories were social categories. Heritage has obvious thematic continuities with heirship so conceived and understood, just as cultural property has obvious continuities with private property (especially in terms of exclusive possession asserted vis-à-vis another). But

³⁴ See, e.g., the essays in Amy Gutmann and Charles Taylor (eds.), *Multiculturalism* (Princeton University Press, New Jersey, 1994).

'heritage' and 'cultural property' represent wrap-around terms deployed in the discourses of politics and economics, underpinned, *inter alia*, by history-writing and ethnography, as the case may be. In legal terms, the close connection between legal and social concept or construct is lost. Cultural property or heritage is put together, haphazardly and unevenly, through a plurality of legal, political, bureaucratic, administrative, fiscal, and commercial mechanisms and processes. This is clearly registered 'inside' the law itself, with cultural property or heritage-related questions being dispersed across the law of charitable trusts or foundations, private ownership law, the law relating to export controls, planning, preservation (e.g. listing of buildings and ancient monuments), tax breaks for donors, and behind much or all of this, the ceaseless impersonal and by no means always 'joined-up' work of bureaucrats at local, national, or international (e.g. UNESCO) level.

Like the one, marked, side of many other distinctions, ownership or property (in distinction to non-ownership/non-property) indicates a cut, a mark, an incision in the spectrum of possibilities. If we can attribute ownership to an individual, we have to acknowledge that this is just one operation among many possible other operations; we may just as well attribute ownership to collectives as to individuals. This is obvious enough when what is at stake are intellectual property rights (IPR); creativity/originality/invention are self-evidently mechanisms for attribution, for making a decisional incision which calls a halt in an infinite regress to some beyond-our-experience first or final cause (as the case may be). In the more familiar world of tangible things, 'possession' serves a similar purpose. With just this type of operation in mind, it is not difficult to see group ownership as something effected by the same kind of process. All that is different is its incision point.

These are questions of what lawyers call the subject of ownership and laymen 'the person'. What about things, or the 'subject matter' of property claims, i.e. the 'object' of property? Using the same kind of approach, something similar happens. The world is what it is, and we construct fields of representations of the world in order to operate 'in' it. So far as ownership is concerned, we can chop up this field more or less as we like, though no doubt in most societies including our own we approach this task or necessity with prejudice and therefore imagine a range of constraints to be 'really there' and limiting our freedom in regard to this type of operation. Subject to that, within this field of representations, we can and do proceed both horizontally (in terms of differentiation or parcellisation: individualisation of ownership) and

vertically (claims to claims; rights to rights – equities, securitisation, shares, and debentures).

In the case of cultural property, we need an owner: culture or society will do here. We need a subject matter: 'culture' (or more precisely, bits, items, components which can be treated as constituent elements of a 'culture') serves this function. Which bits and components are relevant or appropriate is also open and a matter for the old technology of recognition.³⁵

Cultural property operates in the context of the distinction between nature and culture. It operates within one side of this distinction but it imports this distinction into itself through re-entry, i.e. the distinction between nature and culture 'reappears' within the distinction nature and culture on the culture side of this original or guiding distinction. Within the space marked out as culture, a distinction is drawn between the ephemeral and the permanent, the *monumentum aere perennius*. In more narrowly legal terms or frames of reference, it operates in a complicated number of ways alongside or in relation to what modern lawyers tend to use as their basic guiding distinction (at least at the level of grouping the various outputs of the legal system for classification purposes). This is the distinction between public and private law.³⁶

Putting these distinctions together into some more integrated architecture, we have something like the following: (Ownership of) Nature splits into private or public ownership, with private ownership subject to 'public control',³⁷ and those domains of nature which 'cannot' be owned – e.g. the subjection of the human body to IPR. Within this same framework, slavery is prohibited (at this point we may want to talk about 'natural law' in all its many meanings) and prostitution and

³⁵ See, e.g., discussion of cases brought by US Customs regarding the importation of 'art' into the United States in Ruth B. Phillips and Christopher B. Steiner, 'Art, Authenticity and Baggage' in Ruth B. Phillips and Christopher B. Steiner (eds.), *Unpacking Culture: Art and Commodity in Colonial and Postcolonial Worlds* (University of California Press, 1999), pp. 14–15. See also Michael C. Fitzgerald, *Making Modernism: Picasso and the Creation of the Market for Twentieth-Century Art* (University of California Press, 1996) on the relationship between market-making and 'art'.

³⁶ See, e.g., William Howarth, 'Property Rights, Regulation and Environmental Protection: Some Anglo-Romanian Contrasts' in C.M. Han (ed.), *Property Relations: Renewing the Anthropological Tradition* (Cambridge University Press, Cambridge, 1998), pp. 181–200.

³⁷ A useful guide is Michael Ross, *Planning and the Heritage: Policy and Procedures* (2nd edn, Spon Press, London, 1996).

pornography are problematised. In the order of nature, humans are free, and this means that they cannot be assigned to any order of property. In this domain, the issue of therapeutic cloning presents a major problem for legal (and moral) thought.³⁸

(Ownership of) culture splits into private or public ownership, with cultural property often taking the form of or being manifested in public control. The public interest often serves as an adequate legitimisation device for asserting such control, over e.g. buildings or the export of artworks and so on. The thematisation of this familiar situation in terms of cultural property tends to require and be deployed against an 'Other'. These usually take the form of a predator, whether a Vandal or an Imperialist or simply a Croesus (Hearst).³⁹ In these defensive or restitutive (Elgin Marbles) contexts, cultural property becomes something more than the claim to exert public control over public or private property in the name of the public interest in the preservation of its own culture.

To move the analysis beyond this, we need to draw attention to the question of territory and place. One important area of public control in the name of cultural property is the control over exports of art, buildings, and monuments. This is somewhat paradoxical in that the rise of such controls or demands for their improved efficacy more or less coincide with the rise of the ephemeral museum in which artworks increasingly travel the world for display in temporary installations devoted to particular artists or themes mounted not least for commercial purposes by the great museums of the world.⁴⁰ Analogous issues arise, especially in the context of First Nations, regarding the export or utilisation of what lawyers would call intangibles: the tourist trade, copying, appropriation of information.

Behind all these attempts at control is the idea of preserving the signs of culture within a place or territory. Human creations – cultural

³⁸ See, e.g., Martha Nussbaum and Cass Sunstein (eds.), *Clones and Clones: Facts and Fantasies About Human Cloning* (Norton, New York, 1998); Jürgen Habermas, *The Future of Human Nature* (William Rehg, Hella Beister, Max Pensky (trans.), Polity, Oxford, 2003).

³⁹ If one wants a contrast between modernity and its precursors, one could perhaps not do better than to consider the contemporary attitude to the spoils of war and how different this is to what went before. 'True' vandalism, of course, has a longer and episodic history: see (for just the modern period) Dario Gamboni, *The Destruction of Art: Iconoclasm and Vandalism Since the French Revolution* (Reaktion, London, 1997).

⁴⁰ Francis Haskell, *The Ephemeral Museum* (Yale University Press, New Haven, 2000).

objects – have a proper place, in some, maybe many cases, a proper place which is necessary in order to be what they are. Cultural objects have a place of their own and, perhaps, as the flipside of this, places have a *genius loci* which depends on the presence *in situ* of these objects.⁴¹ Of course, this old theme acquires a new meaning in an age of mass tourism.⁴²

This leads in turn to a very fuzzy complex of fantasies of origins and of archives.⁴³ The general point however is that cultural property is in large measure, though not entirely, a function of the age of mass-production and mass-consumption and it combines in its dual focus on the typical and the unique elements of both sides of the organising framework of modernity.⁴⁴

It could be claimed that there is a fundamental circularity in the very idea of cultural property. The basic idea of property either refers to the relation between persons and things or to the relation between persons in respect of, in the context of, things. The former view is the one which actually operates in the consciousness of people – it is how people think about property claims when they utter ‘This is mine’; the latter is how academic lawyers and philosophers tell us to think about property when we scrutinise closely the meaning of the utterances we utter. Whichever view we adopt, cultural property presents the subject of property, the bearer of rights, as a culture, and the object of property (or the intersubjective context) as a culture. In the commonsensical idiom, a culture owns a culture; in the academicised idiom, a culture establishes relations with another culture in respect of a (its) culture.

In practice, of course, cultures (whatever they are) need champions when conflicts or disputes arise, and the natural champion of a culture in this situation is a state. Here too, however, we have circularity to the extent that one pattern of state-building is precisely to assert the need to build a state to encapsulate a culture. Greece and the Elgin Marbles is

⁴¹ See, e.g., the extracts collected in John D. Hunt and Peter Willis (eds.), *The Genius of the Place: The English Landscape Garden 1620–1820* (MIT, Cambridge, MA, 1988). cf. Marc Augé, *Non-Places: Introduction to an Anthropology of Supermodernity* (John Howe (trans.), Verso, London, 1995).

⁴² See, e.g., Priscilla Boniface and Peter Fowler, *Heritage and Tourism in the ‘Global Village’* (Routledge, London, 1993).

⁴³ In which the museum is the core institution, the context for restoration issues and the rationale of collecting. The purpose of the museum is a permanent but endlessly refined problem.

⁴⁴ See Phillips and Steiner, ‘Art, Authenticity and Baggage’, at p. 14.

a prototype case.⁴⁵ Championing the Greek claim to the Elgin Marbles, Melina Mercouri offered these reflections on the meaning of their 'loss':

We see ancient cultural chains broken, past traditions crumble and wonderful special characteristics wither away. Our common memory is threatened, our soul shrivels, our creativity is stifled, our present becomes rootless. 'He who has nothing old has nothing new', says an Arab proverb. This past must emerge from the museums in order to become a source of inspiration and creativity, to become the instrument and the joy of the people.⁴⁶

This illustrates the paradoxical entanglements which flow from modern ideas and practices of curatorship and museumisation.⁴⁷

Oddly perhaps, considering what it is and has been, Greece is in some ways prototypical of this. The Greek state emerged on behalf of and represented the self-assertion of Greek culture. In long-established states like that of Britain (rather than the United Kingdom, whose identity and existence has always been more fragile)⁴⁸ this kind of move was unnecessary, and the politics of cultural property emerged against two rather different yet chronologically overlapping backdrops: the imperialisation of the identity of Britain in the late Victorian age, partly (maybe largely) fuelled by the politics of rivalry and emulation given the emergence of the German Empire; the threat of vandalism (in reality, financial hegemony and buying-power) from the thriving United States.

But perhaps these perspectives should be reformulated. Perhaps we should say that a 'living' culture has a property in its heritage (there

⁴⁵ See especially William St Clair, *Lord Elgin and the Marbles* (3rd edn, Oxford University Press, Oxford, 1998).

⁴⁶ Melina Mercouri, at the World Conference on Cultural Policies, UNESCO (Mexico City, 29 July 1982).

⁴⁷ See, e.g., Eilean Hooper-Greenhill, *Museums and the Shaping of Knowledge* (Routledge, London 1992); Susan M. Pearce, *Museums, Objects and Collections: A Cultural Study* (Leicester University Press, Leicester, 1992); Douglas Crimp, *On the Museum's Ruins* (MIT, Cambridge, MA, 1993); Robert Lumley (ed.), *The Museum Time-Machine: Putting Cultures on Display* (Routledge, London, 1988); Peter Vergo (ed.), *The New Museology* (Reaktion, London, 1989); Carol Duncan, *Civilizing Rituals* (Routledge, London, 1995). The idea that the museum stifles 'life' is more or less as old as the idea that museums preserve and conserve cultures.

⁴⁸ cf. Norman Davies, *The Isles: A History* (Macmillan, London, 1999); R.R. Davies, *The First English Empire: Power and Identities in the British Isles 1093–1343* (Oxford University Press, Oxford, 2000); Paul Langford, *Englishness Identified: Manners and Character 1650–1850* (Oxford University Press, Oxford, 2000).

is a certain precision involved in the archaism of ‘a property in’). This means that a culture’s past is conceived as an inheritance. This property means that a culture is entitled to have its inheritance preserved and not violated. The problem is what this means in an era of globalisation following a long period of extensive and intensive culture-contact and commercial exchange and the resulting near-impossibility of almost any culture remaining impervious to commodification.⁴⁹

CONCLUSION

There is a tendency among legal theorists to see legal categories as constitutive – to see the legal conceptuality of persons and things as written on the world, so that each is fundamentally juridical in character. I have argued elsewhere, with the common law mainly in mind, that this was once true but that it is not anymore.⁵⁰

However, we may wish to distinguish two processes in play here. First is the way in which traditional legal categories which organise both thought and society have simultaneously survived but slipped away from the grasp of the law. These are categories like person, gender, thing, and family. In these domains, legislative and adjudicative processes are involved in ‘recognition’ rather than constitutive exercises, in recognition or non-recognition of realities which arise and are validated as ‘true’ in some other place outside the law.⁵¹

As an alternative, we could try to re-think law’s supposed ‘constitutive’ role in terms of *repetition*. Topics acquire a certain density through thematisation and repetition in the communication systems of society, including the legal system. (Seen in these terms, there is again a curious simultaneity in the thematisations of cultural property and human rights.) This can include all the law-oriented techniques of government

⁴⁹ See generally Richard Handler, ‘On Having a Culture: Nationalism and the Preservation of Quebec’s Patrimoine’ in George W. Stocking, Jr (ed.), *Objects and Others: Essays on Museums and Material Culture* (University of Wisconsin Press, Madison, 1985), pp. 192–217.

⁵⁰ See, e.g., Gillian Rose, *Dialectic of Nihilism* (Blackwell, London, 1984); for discussion, see W.T. Murphy, ‘Memorising Politics of Ancient History’ (1987) 50 *Modern Law Review* 384; *The Oldest Social Science: Configurations of Law and Modernity* (Oxford University Press, Oxford, 1997); ‘Law, History of its Relation to the Social Sciences’ in *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier Science, Oxford, 2001).

⁵¹ See Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (Harvard, Cambridge, MA, 2000), esp. ch. 3.

(consultation papers, White Papers, Bills) as well as political manifestos, press releases and their take-up by the mass media and so on, and the adaptation of bureaucracies to manage thematic domains of societal noise and concern. For legal and governmental apparatuses, then, participation in the repetition of themes can be both a matter of accident and contingency and a matter of explicit recognition.

In the emergent cultural property context, a very old and still very important technology is of interest here – the list.⁵² In the United Kingdom, the list enters ordinary communication about heritage and cultural property through the terminology of the 'listed building' which means, in simple terms, that the building has been designated part of the heritage and appears somewhere on a list to that effect. Although as with winning competitions to host Olympic Games, there are potential downsides, in an age of global tourism being listed as a World Heritage Site is a bit like winning an Oscar. Although acutely overdetermined not so much by the weight of its own history as by the vast heterogeneity of practices which are involved in making it what it is, all the elusiveness of cultural property is practically 'managed' by producing and publishing lists. And lists have an added attraction: unless closed, new items can be added. And from time to time (though this is less likely with cultural property items) lists can be pruned.

The histories of the 'old' London Bridge, the Crystal Palace, or of Cleopatra's Needle show that what the law classifies as 'immoveable' is itself (inevitably) artificial, although for the most part it is easier to strip and ship the ornamentation of such structures. Nonetheless, the technology of listing works most effectively with these so-called immoveables, and more problematically with moveable property. Indeed, it is precisely the relative ease with which art and artefacts can be moved from one place to another that has created the current climate for cultural identification and preservation as earlier (late nineteenth-century) fears about the irreplaceable loss of fixed structures through neglect or outright demolition are augmented by new anxieties centred around the movement of things – from 'high art' to value-laden humble artefact – around the globe and the demand that they be restored to their 'proper' place.⁵³

⁵² Jack Goody, *The Domestication of the Savage Mind* (Cambridge University Press, Cambridge, 1977), ch. 5.

⁵³ See, e.g., Lynn H. Nicholas, *The Rape of Europa: the Fate of Europe's Treasures in the Third Reich and the Second World War* (Macmillan, London, 1994).

Listing is perhaps the simplest as well as earliest device through which old ideas of heritage rooted in and manifested through tombs and monuments, heroes and narratives, is transformed into something more anonymous, dispersed, and in some sense 'aesthetic'. It may add something, of course, if a building can be associated with a 'name' from the past, just as a portrait of a king may signify something extra, as does a headdress or spear or a suit of armour if it can be plausibly claimed that a name that means something once used it. Beds monarchs have slept in are a staple of many English country houses and a must-see element on their itineraries for visitors. But listing is in the end indifferent to such concerns, at least as a mature legal and bureaucratic practice. Its developmental logic is ultimately that of the museum, and, sustained and nurtured by architectural historians, cultural historians, local government structures, preservation campaigns, as well as the mass media, listing evolves into a practice in which what is sought to be preserved and restored if necessary is what is typical and representative as well as what is outstanding in the built environment.

Repetition, which in the context of the practice of listing includes the question of what to list next (time does not stand still; the present soon becomes the past), is visible in other areas which are fairly remote from the legal and administrative bureaucracy of listing. Catalogues, guides, coffee table books, installations, history programming in the mass media, voluntary societies for the study of this or the preservation of that, all contribute to a value-laden facticity of a past which demands more and more attention precisely as it acquires greater and greater density.⁵⁴ The past demands with increasing stridency that it should be restored to itself, and in the process what earlier generations saw as improvement and modernisation come in for critical examination and for reversal. Original pigments, fabrics, ornamentation must be restored, even if the materials for such restoration must be newly fabricated. Things must be restored to their places of origin. Even human remains should be returned to where they properly belong.

The law has little to do with generating this kind of agenda. The cultural transformation just alluded to here is a kind of cumulative effect, and a complex one at that, of many overlapping, intersecting, and heterogeneous developments. But these developments do expose

⁵⁴ See, e.g., David Lowenthal, *The Heritage Crusade and the Spoils of History* (Viking, London, 1997); Peter Fowler, *The Past in Contemporary Society* (Routledge, London, 1992).

the inadequacies of the law's traditional approach to many of the questions posed in this field of culture. Contract and private property, the traditional ways of disposing of disputes about things, no longer suffice. Not even some kind of utilitarian calculus, as embedded in the cost-benefit approaches of planning bureaucracies or in the arguments of developers, and with which courts and tribunals in particular have become reasonably familiar, is sufficient anymore. And so, although cultural property is ostensibly focused on material things, the legal technology of recognition is, in reality, being set to work on a phenomenon no less immaterial than in the domain of IPR, and in a domain riddled with what are perhaps more intractable conflicts.

CHAPTER FIVE

OWNERSHIP OR OFFICE? A DEBATE IN ISLAMIC HANAFITE JURISPRUDENCE OVER THE NATURE OF THE MILITARY 'FIEF', FROM THE MAMLUKS TO THE OTTOMANS

Martha Mundy

INTRODUCTION

European legal and political theory has long debated the historical genealogy of its distinction between *dominium*/property and *imperium*/sovereignty.¹ With roots in Roman law, the distinction has been described as blurred in medieval Europe; one author writes that *dominium* came 'to denote both proprietary right and governmental authority' by the twelfth and thirteenth centuries.² But from the fourteenth century onwards arguments were advanced to reinstate the

The research on which this chapter draws was supported financially by The Council of American Centers of Oriental Research, Washington, DC, in 1997, the London School of Economics in 1999, and the British Academy in 2001–2. Copies of the manuscript material consulted were graciously made available to me by the staff of Süleymaniye Kütüphanesi, Istanbul and Maktabat al-Asad, Damascus; I am most grateful to Necati Aktaş and Amira Burniya for making work in these institutions so enjoyable. And a word of thanks is due to the Directors of the Swedish and American Research Institutes in Istanbul and to the Bishop of the Syriac Catholic Church in Damascus who welcomed me in their hostels. Lastly I am most grateful to Jane Hathaway, Richard Saumarez Smith, John H. Mundy, Alain Pottage, and Engin Akarlı for their criticism of earlier drafts of this chapter.

¹ See (1995) 22 *Droits: Souveraineté et propriété* generally for a review of such work.

² J. Coleman, 'Medieval Discussions of Property: Ratio and Dominium According to John of Paris and Marsilius of Padua' (1983) 4 *History of Political Thought* 212. By contrast, S. Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted* (Oxford University Press, Oxford, 1994) argues against the thesis that concepts of property became merged with those of sovereignty under 'feudalism'.

distinction as central to law and political theory.³ In the course of these arguments a central problem emerged: the origin of property. The search for an ultimate origin means that from John of Paris and Ockham in the fourteenth century, through the Spanish scholastics of the sixteenth century to Grotius and John Locke in the seventeenth century, jurists and political theorists argued about an origin outside historical time in a state of nature or in an original delegation by God to Adam.⁴ The same *topoi* of argument were deployed from the seventeenth century to justify a truly extravagant construction of private property as the prior condition for political freedom.⁵ Thus by the eighteenth century, European legal and political thought had embraced a veritable ideology of property often far removed from the complex, relational character of property law itself.⁶ It was the political ideology of property which asserted the absolute division of owner/person from object/thing. The law, while it slowly eliminated classical forms of the ownership of persons as things (slaves), was to elaborate new principles of ownership of reified potentialities (labour, industrial capital, authorial rights) wherein persons hid behind things very imperfectly.⁷

It can safely be said that no parallel political ideology of property or concern with its misty origins marked the legal and political debates of Islamic thinkers. One has to wait until the very end of the nineteenth century in the greatest Islamic state which survived European conquest, the Ottoman Empire, to find something akin to an ideology – as

³ This is Coleman's thesis concerning John of Paris, see 'Medieval Discussions of Property' at pp. 209–28.

⁴ See B. Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150–1625* (Scholars Press, Atlanta, 1997) esp. ch. 6, 'Property, Natural Right and the State of Nature', pp. 131–69.

⁵ As true for English as for French political theory but with a German apotheosis, one might say, in G.W.F. Hegel, *Elements of the Philosophy of Right* (A.W. Wood (ed.), Cambridge University Press, Cambridge, 1991), pt 1, s 1 on property, pp. 73–103.

⁶ See R. Ashcraft, 'Lockean Ideas, Poverty, and the Development of Liberal Political Theory' in J. Brewer and S. Staves (eds.), *Early Modern Conceptions of Property* (Routledge, London, 1996), pp. 43–61. Ashcraft's article and several others in the same collection stress the distance between the actual character of property rights in the common law and the ambient political ideology of property. Yet over time, as Ashcraft also notes, ownership was developed as the ideal legal form to manage ever more economic relationships.

⁷ 'Potentiality' is here used in the sense proposed by M. Strathern, 'Potential Property: Intellectual Rights and Property in Persons' (1996) 4 *Social Anthropology* 1, at pp. 17–32.

opposed simply to a law – of private property. This is not because changes in property relations were negligible over the centuries of Islamic empires; these empires belonged to economic history quite as much as their Western peers. Rather these changes were interpreted within a complex historical legal tradition in which conceptions of individual ownership (*milk/milkiya*) were well established. Thus, with regard to ‘origins’ this tradition considered that Muslim armies had conquered civilised peoples who possessed traditions of both religion and property. Although in Islamic law occupation and cultivation could create property rights in wasteland, this principle had nothing in common with European notions of civilising a ‘state of nature’. And, with regard to modern political ideology, the nineteenth-century Ottoman reform of law and rule elaborated individual rights to private property by a gradual transformation of long-established legal idioms governing different types of property. It was only by the very end of the nineteenth century that unified idioms of private property swept through the legal domain. Thus although the nineteenth century saw private property come to dominate legal relations, it did not represent a keystone of political ideology for the Ottoman state as it did in Western Europe.

In this chapter I shall examine arguments concerning the relation between proprietary right/ownership and government authority/office in late Mamluk Egypt. But first a word of background is in order concerning classical Islamic legal doctrine governing rights to land. In all schools of Islamic *fiqh*, ownership of agricultural land was theorised in terms of its putative legal status established at the time of the Muslim conquests. As noted, this theory did not start from a putative ‘state of nature’ (Locke) nor from an original delegation from God to Adam (Filmer) but rather from recognition by Muslim political authority of the property rights of conquered peoples.⁸ Classical Hanafite jurisprudence distinguished between ownership by those who were Muslims at the moment of conquest and

⁸ The manner that Locke’s ahistorical ‘state of nature’ could be extended to zones of European conquest, allowing the non-recognition of existing occupation, has been stressed by R. Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford University Press, Oxford, 1999). By contrast, Islamic legal doctrines all recognise existing occupation but may differ in the recognition of individual property right or its subordination to Muslim community/state property rights. Shaf’ite doctrine interpreted the conquest of the Sawad of Iraq as having entailed the creation of state *waqf* from the land.

ownership by persons who belonged to other recognised communities, notably Jews, Christians, and Zoroastrians. Like Muslims, non-Muslims were recognised as proprietors of land (as *malik* of *millk* property) and acknowledged Muslim sovereignty through payment of taxation, although the form of taxation imposed on them differed. Muslims paid *'ushr* (tithe) on their land, non-Muslims paid *kharaj*, a tax often equated by jurists as the symbolic equivalent in land-tax of the poll-tax paid only by recognised non-Muslims (*dhimmis*). Thus, while the tithe was fixed at one-tenth, *kharaj* could be anything between one-quarter and one-half of the land's produce. *'Ushr* tithe was thus imposed on the land of existing owners who converted to Islam at the time of the conquest or on land uncultivated or abandoned by its former owners and allocated to Muslims by political authority.

Such was the Hanafite tradition's account of the history of property in land: it entailed no fundamental rupture in property itself. New forms of taxation reflected Muslim sovereignty but property was not in itself seen to be created thereby, merely legally recognised. In later centuries the link established in this account between the personal religious status of the owner (Muslim versus non-Muslim) and the taxation of land was to be abandoned. Given the treasury's need for tax, *kharaj* land was to remain *kharaj* land, even if it was sold to a Muslim or its owners converted to Islam. Later doctrine also stressed the role of the sovereign in ensuring the cultivation of land and the payment of tax. If an owner did not cultivate land or pay the land-tax, political authority could temporarily take the land under its administration (*aradiy al-hauz*) and rent it out to cultivators; or if no cultivators were willing to take on the land, the treasury could lend them a sum required to initiate cultivation to be deducted over time from the produce. If neither option proved possible, Muslim political authority could sell the land, returning to the land's owner what remained of the price paid after deduction of back tax. Lastly, as part of this regime of government over property owners, the ruler could grant part of the tax revenues to a particular military or religious administrative figure as a revocable grant known as *iqta'*.⁹ The recipients of such grants of tax revenue were seen to hold a form of

⁹ The *iqta'* could also denote an outright grant of property to uncultivated or waste land, but the *iqta'* as tax-assignment was the more important historical institution. See Abu Yusuf Ya'qub b. Ibrahim (113–182AH), *Kitab al-Kharaj*, reprint of edition published Bulaq 1302AH (Dar al-Hadatha, Beirut, n.d.) in collection of texts entitled *Fi'l-turath al-iqtisadi al-islami*.

office described in legal idioms quite distinct from those for ownership of land.¹⁰

Thus from the fourteenth century onwards classical Hanafite theory of property right in land was to be superseded by fundamentally different conceptions of property in land wherein political authority replaced the cultivator or private individual as the primary owner of agricultural land. This change in the conception of ownership in turn engendered debate about the nature of subordinate right, notably the right of the holder of an *iqta'* and that of the cultivator. It is with the debates arising from such later transformations that this chapter is concerned.

Ownership (*milkiya*) or office (*wazifa*): the two principles were set against one another in one moment of Islamic juridical debate concerning rights over land. Although office may arise from property or property from office, the two terms build from different core notions,¹¹ offering, as in European law, different frames for the construction of claims over persons and things. So, even today, European legal traditions differ in the degree to which they construct labour (a 'potentiality' if ever there was one) as a thing owned and contracted by the individual labourer or as a service associated with a status in a hierarchy of social roles. The first construction, deriving from Roman law and enshrined in modern French law, builds on legal idioms of property; the second, more central in German law, on those of office.¹² If the two constructions can be contrasted, combinations of the two have also not been unknown.

The debate which we shall examine concerns the conceptualisation of rights over the 'potentiality' not of labour *per se* but of the fruits of

¹⁰ This account draws on Abu Yusuf, *Kitab al-kharaj*, and the historical overview in B. Johansen, *The Islamic Law on Land Tax and Rent: The Peasants' Loss of Property Rights as Interpreted in the Hanafite Legal Literature of the Mamluk and Ottoman Periods* (Croom Helm, London, 1988).

¹¹ Starting from the dyad, person/owner and thing/object, ownership can be extended in complex relations with other parties through a variety of contracts such as lease and loan. Unlike ownership, however, office can never be imagined or naturalised as a simple dyad of person and thing. Rather office entails a triad of persons and things in which a person delegates to another a power over other persons or things. And again unlike ownership, office is generally, if not always, conceived as revocable by the superior person in the chain of delegation.

¹² For a survey of European law in this regard see A. Supiot, *Critique du droit du travail* (Presses Universitaires de France, Paris, 1994), pp. 13–22. Supiot's rather summary dismissal of the classical Roman legal construction of work (*ibid.* at p. 14) can be corrected by Y. Thomas, 'L'usage' et les 'fruits' de l'esclave: opérations juridiques romaines sur le travail' (1998) 7 *Enquête* 203.

cultivation of land. Should these be construed in terms of property or of office – as arising from a hierarchical distinction of the rights to a thing (land) or from a hierarchical splitting of offices (*legal personae*) concerned with the production and distribution of agricultural produce? This debate, conducted from the fifteenth century, was proper to the Hanafite school of Islamic jurisprudence, the school formally recognised by the major post-classical Islamic states of the central Near East, the Mamluk and the Ottoman. The Mamluk scholar Ibn Qutlubugha, whose views are discussed below, argued for ownership yet drew his strongest arguments from analogues between rights to land and rights to an object (the slave) who is also a person.

THE DEBATE UNDER CONSIDERATION

The texts we shall examine from late Mamluk Egypt provide a novel conceptualisation of the nature and rights of the holder of an *iqta'* or 'administrative grant'.¹³ In classical Hanafite doctrine the *iqta'* entailed the sovereign's allocation to office-holders (military men or religious functionaries) of tax revenue from land privately owned. But once agricultural land came to be seen as the property of the community vested in the treasury, then the nature of the grant also invited re-thinking. It is relevant, moreover, that this grant – unlike fiefs in many parts of Europe – was in principle not to be inherited but was subject to withdrawal by supreme political authority. With regard to land and taxation, political authority was cast legally as representing the Muslim community, with the secular office-holder, the Sultan, acting in lieu of the religious Imam for the management of land. The right of an administrative grantee thus stood between ownership by the treasury and the right of the cultivator; it represented a right to a potentiality, in the form of enjoyment of agricultural produce or urban rent.

We examine two epistles which discuss this question within the context of juridical argument about property right more generally.¹⁴ Their

¹³ I shall follow Claude Cahen who has argued convincingly that the Arabic term *iqta'* should not be translated by 'fief' but rather as 'administrative grant'. See Cahen's article on *iqta'* in the *Encyclopaedia of Islam*, New Edition (E.J. Brill, Leiden, 1960–2002) vol. III, pp. 1088–91. The cumbersome phrase 'administrative grant' will often be shortened to 'grant' in this chapter.

¹⁴ The first and major epistle is Zain al-Din Qasim Qutlubugha, *Risala fi jawaz ijarat al-iqta'*, Laleli 951/4, Süleymaniye Kütüphanesi, fol. 176–89 and the second is *Al-jawab fi jawaz ijarat al-iqta'* of which there is a copy but in a difficult hand in Laleli 951/3,

author, Zain al-Din Qasim ibn Qutlubugha 'Abdullah, known to later tradition as al-Shaikh Qasim (d.879AH/1477CE), was the son of a freedman and student of the distinguished jurist, Kamal al-Din Muhammad, known as Ibn al-Humam (d.1457CE) who was recognised by the Hanafite tradition of Islamic jurisprudence as the first jurist to articulate the 'later' doctrine on land ownership adopted by subsequent jurists of the school. Ibn al-Humam argued that, as a result of the deaths of its proprietors, ownership of all the land of Egypt had passed to the state treasury.¹⁵ The doctrine of escheat of heirless estates to the treasury was ancient, but its extension to all the lands of the Mamluk domains in justification of treasury ownership of land marked a radical departure from the doctrine of earlier centuries sketched above.

Baber Johansen has placed this shift against the background of a series of changes in the doctrines of the Hanafite school concerning agricultural contracts. These contracts built upon the basic vocabulary of ownership in the tradition which distinguished between *manfa'a* (use-value or object of utility, conceived as an 'accident' distinct from the object itself) and the essence of the person or object owned, the *raqaba* (literally the 'neck') or *'ayn* (the thing itself) of property.¹⁶ Johansen documents how from the eighth century onwards debate concerned, first, commodification of the potential use-value of land (*manfa'a*) in the contract of lease (*ijara*) and, secondly, exchange of the use of land for a proportion or share of the produce, not a clearly defined quantity, in a share-cropping contract (*muzara'a*). These contracts were problematic for early Islamic jurisprudence. At the heart of early *fiqh* doctrine stood the contract of sale wherein individual persons exchanged concrete and defined objects; only clearly defined objects could legally be bought and sold.¹⁷ Land too had been considered as a definable and measurable object. With the contract of sale at its core,

Süleymaniye Kütüphanesi, fol. 169–75. I have therefore relied instead on the copy in Zahirīya collection 7470, Maktabat al-Asad, fol. 1–17, which is in the beautifully clear hand of the distinguished jurist, Muhammad 'Abdullah b. Ahmad b. Ibrahim al-Khatib al-Timurtashi and dated 981AH/1573–74CE.

¹⁵ See the translation from *Sharh al-Fath al-Qadir* in Baber Johansen, *The Islamic Law on Land Tax and Rent* (Croom Helm, London, 1988), pp. 84–5.

¹⁶ This distinction follows Roman legal tradition with the notion of 'accident' respecting Aristotelian philosophical idioms. Compare the review of this fundamental distinction in Roman law in Y. Thomas, 'L'usage' et les 'fruits' de l'esclave'.

¹⁷ cf. Johansen, *The Islamic Law*, at p. 53. There were also notions of the due price so that a sale where the price paid was entirely exorbitant (*ghubn fahish*) could be legally voided.

the *fiqh* tradition was thus at the outset hostile to contracts explicitly exchanging potentialities, be they of use-value or of produce, that could not be precisely evaluated at the time of contract. But of necessity it came to allow contracts governing potentialities in the form outlined above.

From the tenth to eleventh century CE there appeared a further debate concerning the necessity of a contract – or lack of necessity, the latter being the new doctrine – before a land-owner could claim rent from a person who cultivated his/her land. Lastly, as discussed above, from the fourteenth century onwards jurists came to debate the very basis of property in land. Until then, ownership of land was seen to derive from the ruler/imam's recognition of individual possession at the time of the Islamic conquest or from the ruler's allocation of abandoned and uncultivated land to Muslim supporters; in return individual owners owed tax to the treasury. The new doctrine, however, interpreted ownership not as arising from possession by individuals but as property of the treasury delegated in different forms to intermediaries and cultivators. The earlier doctrine was not formally rejected nor was it forgotten; rather, as Ibn Humam argued, history, in the form of the gradual death without heirs of tax-paying owners, had simply rendered it obsolete in lands ruled by the Mamluks.¹⁸

Johansen's account of these developments was set within a narrative emphasising both systematic doctrinal change in the Hanafite tradition and the manner in which doctrinal change reflected the peasants' loss of proprietary rights over the centuries. The account invites qualification only in the manner in which its narrative conflates shifts in legal doctrine with an economic history of peasant dispossession. It is not clear that those recognised as proprietors at the conquest, both original holders and Muslims who were granted abandoned or uncultivated land, can be fitted neatly into a category of peasant proprietor.¹⁹ The countryside of the Umayyad and early Abbasid empires was, like that of the Hellenistic and Sasanid empires they replaced, often held by proprietor-householders (some with slaves) or by city-dwelling

¹⁸ Ibn al-Humam's remarks refer to Egypt alone but the doctrine was applied to all the Mamluk lands and after them the Ottoman lands. The earlier doctrine will never be forgotten and so can be revived from the late nineteenth century as reference for an Islamic private property of the twentieth century.

¹⁹ The work of Ziaul Haque, *Landlord and Peasant in Early Islam: A Study of the Legal Doctrine of Muzara'a or Sharecropping* (Islamic Research Institute Press, Islamabad, 1977) details landlord ownership in early Islam.

landlords, the variety of whose circumstances needs to be borne in mind.²⁰ Lastly, there is little reason to assume that agricultural practices were as simple as the first statements of legal doctrine suggest. From very early on, revenue assignment was a practice known to government, theorised in Abu Yusuf's (d.182AH/798CE) renowned treatise on tax, *Kitab al-kharaj*.²¹ The elaboration of doctrine with regard to contracts of rental and share-cropping may be seen to reflect the development of the reach of the jurists' law, from merchants in the towns to the entire countryside – not the absence of share-cropping arrangements in the earliest centuries of Islam.²² In other words, at issue is not a simple loss by cultivators ('peasants' in Johansen's terminology) of property rights but the development of more uniform hierarchical relations in agriculture which alone render 'the peasant' (a cultivator whose rights in land are subordinate to those of landlords or fiefholders) a coherent category.²³

Such questions apart, Johansen's account rightly stresses the importance of the change in the basic theory of property rights in land of the Hanafite school evident by the fifteenth century. Such a change did not occur without vehement debate, in which jurists of other legal schools, notably the Shafi'ite but perhaps also the Hanbalite, denounced Hanafite doctrine outright. Even within the Hanafite school, to which the rulers belonged, doctrinal solutions were fiercely contested along the way.²⁴ *Fiqh* was very much a jurists' law, but it remained part of a religious tradition in which ethical arguments from

²⁰ See M. Morony, *Iraq after the Muslim Conquest* (Princeton University Press, 1984), p. 508 for the partial survival of the 'landed aristocracy of the late Sasanian period'.

²¹ Abu Yusuf, *Kitab al-Kharaj*.

²² As Johansen, *The Islamic Law*, p. 52, writes summarising the evidence: 'From the historical sources and the writings of the jurists it would appear that the contract was first used on state, *iqta'* and *waqf* lands and later found its way to other forms of landed property.'

²³ Compare D. Herlihy, 'Households in the Early Middle Ages: Symmetry and Saint-hood' in R. McC. Netting, R. Wilk, and E. Arnould (eds.), *Households: Comparative and Historical Studies of the Domestic Group* (California University Press, Berkeley, 1984), pp. 384–406, for a contrast between the asymmetrical households of antiquity to the 'peasant' household of medieval Europe.

²⁴ For Shafi'ite opposition to the emerging Hanafite doctrine of the state ownership of land see both the text of Taj al-Din 'Abd al-Rahman b. al-Diya' al-Fazari (presumably the Shafi'ite scholar Taj al-Din al-Farazi d. 690AH/1291CE given in C. Brockelmann, *Geschichte der arabischen Literatur* (E.J. Brill, Leiden, 1937–49), Suppl. 1, p. 686) *Kitab fi 'ard al-sham wa-'l-kalam 'alay-ha* which reiterates that the land of al-Sham belonged to its proprietors from the conquest and implores rulers to respect

fundamental principles were advanced against competing jurists' justifications of the necessity (*darura*) of legal change.

THE ADMINISTRATIVE GRANT (*IQTA'*) AS PROPERTY

The major epistle of Ibn Qutlubugha to be examined here addresses the question of whether the military holder of an *iqta'* can legally rent its land to cultivators.²⁵ Ibn Qutlubugha notes that no earlier text had explicitly ruled on the legal status of this practice. The answer advanced in the epistle is that such rental is licit. The treatise is highly structured, opening with an affirmation of this judgment, advancing seven legal

their property rights (Zahiriya collection 9080, Maktabat al-Asad, fols. 126b–131a), and the fire-and-brimstone condemnation of the godlessness (*kufr*) of the rulers and those jurists who would justify their practices of extortionate taxation and appropriation of land in the work of Taki al-Din Abu Bakr b. Muhammad b. 'Abd al-Mu'min al-Hisni al-Huseini al-Shafi'i al-Dimashqi (752–829AH/1351–1426CE), *Kitab qam' al-nufus wa-ruqyat al-manus*, Bagdatlı Vehbi Efendi 649, Süleymaniye Kütüphanesi, especially fols. 71b–82b. Both the work of al-Fazari *Kitab fi 'ard al-sham* and al-Hisni's *Kitab qam' al-nufus* belong to a genre of oppositional mirror-for-princes tracts. Al-Hisni's great law book, *Sharh al-Tanbih*, Ayasofya 1213, Süleymaniye Kütüphanesi, vol. V, fol. 22a argues that the rulers and judges might themselves be *bugha*, i.e. in opposition to the true imam and hence to be disobeyed. Furthermore in fol. 64a–65b under the discussion of *kharaj* al-Hisni (ibid. at fol. 64a–65b) echoes al-Farazi (*Kitab fi 'ard al-Sham*, fol. 130a) in rejecting the interpretation of the land of al-Sham as *waqf* and hence of what is paid to the ruler as a form as rent (*ujra*); this appears as an earlier form of justification for state ownership of land than that advanced more successfully, at least for the Hanafites, by Ibn al-Humam. Compare K. Cuno's stress on the importance of Shafi'ite doctrine for Hanafite debate on the status of land ownership in Syria in his 'Was the Land of Ottoman Syria *Miri* or *Milk*? An Examination of Juridical Differences Within the Hanafi School' (1995) 81 *Studia Islamica* 1, at pp. 121–45, especially pp. 142–6 where the readings of al-Ramli and Ibn 'Abidin of al-Nawawi, Taqi al-Din al-Subki, and Ibn Hajar al-Haythami are discussed.

²⁵ Zain al-Din Qasim Qutlubugha, *Risala fi jawaz ijarat al-iqta'*, Laleli 951/4, Süleymaniye Kütüphanesi, fol. 176–89. Copies of this manuscript exist in other collections, notably the Chester Beatty Collection 3202/3, but of the work of Ibn Qutlubugha more generally only a few texts have been edited and published. See the list of published works of Ibn Qutlubugha in Zain al-Din Qasim ibn Qutlubugha (d. 879AH), *Hashiyat Ibn Qutlubugha 'ala sharh nukhbat al-fikr* (Ibrahim ibn Nasir al-Nasir (ed.), Dar al-Watan, Riyad, 1999), pp. 10–11. For brief biographies of Ibn Qutlubugha, see Zain al-Din Qasim ibn Qutlubugha (d. 879AH), *Taj al-tarajim fi man sannaf min al-hanafiya* (Ibrahim Salih (ed.), Dar al-Ma'mun li-l-turath, Dubai, 1992), pp. 1–26, and F. Rosenthal, 'Ibn Kutlubugha', *Encyclopaedia of Islam*, New Edition (E.J. Brill, Leiden, 1960–2002) vol. III, p. 848.

analogues to justify the power of a grantee to rent out his usufructuary right to the property, and closing with a discussion of the objections advanced to these parallels and the author's responses to the same.

In conceptualising the property right held by the military grantee, Ibn Qutlubugha deploys the basic vocabulary of his tradition. This distinguishes, as mentioned above, between *manfa'a*, use-value or object of utility, conceived as an 'accident' distinct from the object itself, and the essence of the person or object owned, the *raqaba* or 'ayn.²⁶ Of things/persons owned, some represent objects of commercial exchange (*mal*, with the character of *maliyya*) freely transferable from one person to another, whereas others, such as the service of a slave, can be transacted only by the owner of the *raqaba*. Lastly, in this tradition the concept of lease (*ijara*) builds upon the distinction between the 'essence', which remains with the owner, and the use of an object, which temporarily becomes the property of the lessee; the contract of *ijara* governs a very wide field of objects from labour-service to commercial goods and real properties of various kinds.²⁷

Before we proceed with an examination of the argument and the analogues advanced, we should note two problems that Ibn Qutlubugha had to face. The first is the conditional and limited nature of the grant (*iqta'*), i.e., its unknown extension in time, given that it is not inherited and is revocable by the ruler/imam. The second arises from the difficulty of adapting legal idioms designed to express a contractual relation between two parties to legal relations in which there are, in the juridical tradition, always three parties: the sultan/imam (representing the treasury and the Muslim community), the grantee, and the cultivator (or the tanner, miller, butcher, bathkeeper, baker, or caravanserai keeper in the case of non-agricultural property). From Ibn Qutlubugha's epistle it appears that agricultural land was by far the most common object granted, but legally the same issues arose with regard to urban property. Ibn Qutlubugha had to define the nature of the property in the face of its potential withdrawal by the ruler, and to search for *exempla* in which the classic dyad of owner and object owned was rendered subject to a third party, or in which rights were further granted to a third party. Ibn Qutlubugha's text is thus riven by the tension between the basic idioms of ownership by an individual of a thing and the office-like hierarchy of

²⁶ Qutlubugha, *Risala*, fol. 178b.

²⁷ See the general discussion of *ijara* in J. Schacht, *An Introduction to Islamic Law* (Oxford University Press, 1964), pp. 21 and 154–5.

the three *personae* (ruler, grantee, and cultivator) each of whom holds rights in the same land. The interest of Ibn Qutlubugha's epistle lies in his attempt to theorise the right of the grantee as a limited property right and not as remuneration for an office in the service of the state.

Ibn Qutlubugha builds his argument by a series of analogues (*nazir/naza'ir*) which we now consider.

Of the seven analogues advanced, four concern rights over slaves. Since one of the seven is in fact more a general argument than a similar type of contract, this means that two-thirds concern rights over slaves. It is as if rights over labour-service, resting on the distinction between the 'neck'/*raqaba* of the slave, his or her labour-service, and the commodity value arising from the transaction of that labour, constituted a domain where legal theorisation of the splitting of right was more developed than in the case of real property. Thinking the potentiality generated by the labour of a slave allowed the formulation of more complex rights over real property. It is these analogues which later jurists will recall in their repeated references to the epistle; rather like ourselves the jurists were fascinated by the analogies drawn between rights in persons and rights in things.

The first analogue (*nazir*) discussed provides an example in which:

- (a) ownership is split between the essence (*raqaba*) and the use (*manfa'a*);
- (b) the right to use/service is exchanged for a limited period against goods/services of another nature; and
- (c) the second party is free to rent out to a third party the usufructuary right he holds.

The contract concerns the owner of a slave who contracts a debt and agrees to repay it with the slave's service for a year (*man sulih 'ala khidmat 'abd sanatan*). In this case the debtee comes temporarily to own the use (*manfa'a*) but not the neck (*raqaba*) of the slave.²⁸ What the creditor advanced could be any kind of good so long as it was not identical to the 'coin' in which he is repaid, i.e., a slave's service. The creditor thus comes to own the use of the slave for the period of a year, during which time he is free to sub-lease the slave's service to another. Ibn Qutlubugha argues that this contract is similar to that of the military grantee in three ways. First, the ownership of the use-value of the slave is limited in time just as is the military grantee's tenure of his *iqta'*.

²⁸ Qutlubugha, *Risala*, fol. 176a.

Secondly, just as the repayment of the debt entails an exchange of different types of things, so the grant is made in return for military service to the community of Muslims.²⁹ Thus, in return for the grantee's service the ruler/imam (*al-mumallik*) gives the grantee (*al-mutamallik*) ownership of the usufruct of the administrative grant. The whole is constructed as an exchange, not a reward for service. This point is supported by a further sub-argument in which Ibn Qutlubugha distinguishes between the military grant and other forms of gifts (*'ita'at*) made by the imam to military men for services rendered. Lastly, to return to the analogue, should the creditor wish, he or she can sub-let/sub-contract, rather than use directly, the slave's labour-service.

The second to fourth analogues establish a further set of elements central to the general argument.

The second analogue concerns the lessee of a real property, thereby the owner of its use-value (*manfa'a*), who further sub-lets his use-rights to another. And so can the military grantee who, for the reasons given above, owns the *manfa'a* of the grant and hence can rent it out as can a lessee in the contract of rental (*ijara*).³⁰

The third analogue at first appears wholly dissimilar, but its similarity to the case in point will be seen to lie in the unfolding of an argument. Thus the third model will prove central to the construction of the argument of the epistle as a whole. In it Ibn Qutlubugha states:

- (a) that a land grant requires that the land be cultivated; in other words, land must be prepared, ploughed, worked, irrigated if needed, and harvested; and

²⁹ This point is important, for if the grant were not interpreted as being given in return for payment/service of some kind, then it would not be transactable. *ibid.*, at fol. 176a: 'fa-wajab jawaz mithlu-hu fi'l-iqta' wa-dhalika li'anna manfi' al-iqta' malaka-ha al-jundi bi-iza' ihtibasi-him wa-isti'dadi-him li-ma ya'ud li'l-muslimin min al-masalih allati nadaba-hum al-imam li'l-qiyam bi-ha min qital ada' al-islam wa-rad' al-mufsidin wa-qam' al-kharijin wa-saun al-amwal wa-'l-anfus 'an-hu an abtadil-ha wa-yahtarim-ha al-sarra' wa-'l-tughat wa-hifz marasid al-turuqat wa-mawatin al-murabatat wa-kull ma li'l-muslimin fi-hi maslaha aw daf' madarra.' The term used to describe the military's obligation to serve, *ihtibasi-hum*, is one also used in discussion concerning a wife's service in the law of marriage. (I am grateful to Baber Johansen for this last observation.) In short Ibn Qutlubugha simultaneously argues that the 'service' of the military grantee is an exchange, analogous to commercial exchanges, and yet employs a term which itself expresses exclusion from market relations; the same term is of course also used for the withdrawal of property from commercial transactions in mortmain/*waqf*.

³⁰ *Ibid.* at fol. 176b.

- (b) that this requires share-cropping and rental of the land since the military grantee cannot cultivate the land himself.

In this section abstraction of the person of the owner and the object owned, characteristic of the idioms of property in *fiqh* discourse, simply vanishes. Ibn Qutlubugha's argument here introduces a division of tasks between social offices that does not correspond to an abstraction of social identities from contracting *personae* so characteristic of bilateral contracts. Thus (and anticipating an opposing argument described later, to the effect that a grantee should cultivate his administrative grant himself)³¹ Ibn Qutlubugha responds that if the soldiers cultivated, not only would they not be able to fulfil their military duties; they would by such work become agricultural labourers and the function (*al-ma'na*, the meaning) they must perform would be annulled.³² In a subsequent section the argument is extended to tanneries and mills, which were other forms of property assigned to military grantees, where here again Ibn Qutlubugha argues that practising such trades would entail a debasing of the trustworthy character of the military grantee who should guarantee and protect the property with which he is entrusted.³³ Here the trilateral form of the social offices for whose contracts Ibn Qutlubugha seeks legal parallels leaps into view. Land acts as the 'object' of a social division of labour of a highly specific kind. But since Ibn Qutlubugha is determined to argue for a usufructuary property right of the grantee, it is not possible for him to describe these relations purely in terms of offices or revenue rights.

The long third analogue thus takes the form of a complex argument. After establishing the impossibility of the grantee cultivating the land directly, Ibn Qutlubugha then goes on to argue that the standard arrangement for cultivation, share-cropping, should be regarded as a form of rental. This is all the more appropriate, notes Ibn Qutlubugha, since in the Egypt of his day the cultivator generally provided the seed as well as (although he omits to mention them) the labour and the draught power; in short all the grantee offers is the use of the land, not the other factors of production. This is the reason that Ibn Qutlubugha feels free to equate share-cropping with lease, although they are separate contracts in the *fiqh* tradition. Share-cropping was itself a contract which,

³¹ Ibid. at fol. 180b. ³² Ibid. at fol. 176b.

³³ The terms used in this context are *amin* (ibid. at fol. 180b) and *yad mustahfiza* (ibid. at fol. 182a). Compare the construction of the administrator of Church property as a 'steward' in medieval political debate: Coleman, 'Medieval discussions', at p. 211.

we have seen, the *fiqh* tradition had accepted only under economic and social duress, a point of which Ibn Qutlubugha is very much aware. Indeed, this characteristic of the doctrinal history of share-cropping is what renders it a model for the case argued by Ibn Qutlubugha: just as the tradition had allowed share-cropping, so it should allow the rental of the grant, in the contractual form of share-cropping, to cultivators. The necessity of renting out the use of land of the administrative grant parallels the earlier necessity of share-cropping, accepted doctrinally in defiance of established principles of the school.³⁴ Hanafite tradition had permitted share-cropping since, had it not done so, 'people would suspect [as illegal] all the food they eat in this world'.³⁵ Thus 'the harm arising from judging illegal a practice universal in every era and place is greater than that of declaring the practice of a small group of men illegal'.³⁶

The third analogue is thus more a model of argument than a simple *calque*. It serves to establish that the military grantee must let out his land to a cultivator, that this rental must take the form of a share-cropping contract, and that such rental must be permitted for the same reasons that the contract of share-cropping was permitted. All these stipulations are justified by the dictum whereby historical necessity (*darura*) can override or force a change in doctrine in the field of economic contract.

The fourth analogue concerns the leasing of rights to produce (*ghilla*) assigned to a person from a charitable mortmain endowment (*waqf*). This parallel allows Ibn Qutlubugha to resolve another problem he faces in the legal justification of the practices of military land grants. Analogues 1, 2 and, as we shall see, 5, 6, and 7 all concern the renting out of usufruct (*manfa'a*) to a third party. But for the tradition, although use-rights (*manfa'a*) can be subleased, it is not a commodity (*mal*, i.e., characterised by *maliyya*) to be freely bought and sold by all parties. Only an owner who also holds rights to the essence of the property can ultimately transact the use-right of property.³⁷ By contrast, produce from agriculture and rents paid in money from urban property such

³⁴ The term used by Ibn Qutlubugha (*Risala*, fol. 178b) for necessity is *darura*, the central legitimating principle for jurists of the new doctrine.

³⁵ Literally 'all the food in this world would be eaten with suspicion [concerning its legality] during most of their lives': *ibid.* at fol. 177a: 'fa-yasir jami' aqwat al-'alam ma'kula 'ala wajh al-shubha fi majmu' muddat 'umri-him.'

³⁶ *Ibid.* at fol. 177b. ³⁷ *Ibid.* at fol. 186a.

as baths, mills, caravanserais, and houses represent true commodities (*amwal haqiqiyya*), freely exchangeable in commerce.³⁸

Ibn Qutlubugha then goes on to discuss the phrasing of the documents awarding administrative grants in his day (*marasim al-iqta'at*). The documents drawn up by the administration showed little of this doctrinal sophistication. They simply stated that a certain area or village was assigned to the grantee (*aqta'a-hu ard kadha*) or sometimes that both the land itself (*'ayn*) and the produce (*al-ghilla*) were assigned to the grantee (*khas bi-hi*).³⁹ There was never any mention of use-rights (*manfa'a*) or usufructuary possession. Ibn Qutlubugha notes that such documents should not be taken to imply that the grant entails the transfer of full ownership of the *'ayn*. He thus goes on to suggest two interpretations:

What is intended is either the produce of a village or the usufructuary possession of a village by omission of the middle term [i.e., 'the x of the village' with the 'x' dropped] and it is more likely that the term omitted was the produce not the usufruct.⁴⁰

And this, he says, follows for two reasons. The first is that because the use-values themselves are undefined at the moment of the grant, it is not right to give someone ownership (in return for compensation) of what is not there at the moment of contract; hence ownership of use-value in the contract of lease was permitted only out of necessity and in contradiction to original principle that prohibited such transaction of an unmeasurable or merely potential use-right. Secondly, use-values are accidents of an essence; at the moment (of contract) they are non-existent, and since their future extent is as yet unknown, it is definable only by specification of the period of time (of their potential enjoyment).⁴¹ Ibn Qutlubugha notes that the term 'the grants and the quantities of their produce' occurs in the documents.⁴² This allows him to argue that what the grantee really possesses is the right to profit from the produce of the grant as a commercial good (*ka-dhalika*

³⁸ Ibid. at fol. 178a. Compare the 'fruits' of the slave's labour discussed in Thomas, 'Medieval discussions', at pp. 217–21.

³⁹ Ibid. at fol. 178a.

⁴⁰ Ibid. at fol. 178b: 'innama al-murad ahad amrain imma ghillat [al-qariya] imma manfa'at al-qariya 'ala tariq hadf al-mudaf wa-iqamat al-mudaf ilay-hi wa taqdir iradat al-ghilla 'aula min taqdir iradat al-manfa'a'.

⁴¹ Ibid. at fol. 178b. ⁴² Ibid. at fol. 178a: 'Al-iqta'at wa-miqdar ghillati-ha'.

al-jundi inna-ma aqta'a-hu al-imam istighlal mughillat al-iqta' mal).⁴³ In order to enjoy this right, however, and to retain his social function and status, lease of the use-value is necessary, however problematic it may be doctrinally.

Having established these basic arguments to the effect that the ultimate object of the grant is the commercially exchangeable value of the fruits (*ghilla*) of the land, Ibn Qutlubugha returns to parallels for the hierarchical disposition of rights over property, which again all concern slaves.

The fifth analogue concerns a slave who is given permission to trade with goods or capital (*mal*) of his master.⁴⁴ What the slave shares with the military grant-holder is that both are granted objects for the purpose of making wealth and profit. The contract is the same in both cases: *ijara*, which governs the goods of commerce and real property. This parallel reinforces the point made in analogue 4, namely that the object of the grant is enjoyment of its produce as a good in commerce.

The sixth analogue is the one most often cited by later jurists. It concerns the right of a master to rent out the services of the slave mother (*umm al-walad*) of his child.⁴⁵ The legal background is as follows. Once the master's paternity of a child borne by his slave is recognised, he no longer owns her *raqaba* ('neck') and so can neither marry her to another nor sell her. This, the tradition explains, follows from her having become related (*nasab*) to her master through the mingling of their essences in the child – a kind of reverse flow of genealogical relatedness. The *umm al-walad* will be manumitted on her master's death and as part of his estate. In the meantime he owns of her only her use-value (*la yumlik min-ha siwa manfa'ati-ha*).⁴⁶ Hence he can rent her services out to another but he may not sell her nor contract her in marriage. The interest of this contract lies in the highly differentiated types of right held in the slave, among which the use-value (labour-service) can be transacted when ownership of the neck (essence) cannot.

The seventh and last analogue concerns the right of the guardian of an orphan to rent out the services of the orphan's slave. Ibn Qutlubugha notes that some readings of the tradition stipulate that the guardian

⁴³ Ibid. at fol. 178a: 'ma aqta'a-hu al-jundi min al-iqta' huwa al-mal alladhi yustaghill min al-iqta' dun mujarrad manafi'i-hi.'

⁴⁴ Ibid. at fol. 179a.

⁴⁵ Legally a child whose paternity he has recognised or not disproved.

⁴⁶ Qutlubugha, *Risala*, fol. 179a.

obtains this right only if he is kin to the ward, whereas other interpretations do not require this condition. No new argument is advanced here, but, as in the preceding case it rests on the distinction made between ownership of the neck or *raqaba*, here vested in the orphan, and disposal of the use-value/service. Here, however, the guardian does not own these rights but holds them as steward of the property of the orphan by virtue of his guardianship (*wilaya*) over the orphan as person. We can see a certain parallel between the sixth and seventh analogues: the *umm al-walad* can be said to have become another kind of subordinate than a full slave since the power of the master no longer entails ownership of her neck and hence can more easily be likened to the guardianship over an orphan and his property. These similarities in the basic structure of property rights in persons (and the clarity with which potentiality can be described for slaves in terms of service or maternity) are expressive in an argument whose central objective is to legitimate ownership of the fruits of agricultural production achieved within a vertical social division of labour. At the centre of this construction lies the reification of the concept of use-value, distinct from both the land itself and the actual material produce of the land.

The long last section of the epistle details, and then rebuts, objections advanced to the seven analogues. Several developments to earlier arguments are made here. First, Ibn Qutlubugha argues at length against the analogy of the *iqtaʿ* with an object entrusted or freely loaned to someone, the *ʿariya*, since in the case of the latter the person entrusted with an object is not recognized as having the power to rent out what he or she has been lent. It is the exchange of the administrative grant for the services of the soldier that creates in the grant the character of a freely exchangeable good (*mal*), that can be leased to cultivators. Secondly, Ibn Qutlubugha develops an argument against the thesis that the deputy of the treasury, not the grant-holder, should organise cultivation.⁴⁷ While doctrinally laudable, Ibn Qutlubugha finds such an arrangement totally impractical and to be rejected on the basis of the loss of income and trouble it would cause; a single official, he argues, could neither know of all grants nor be capable of arranging for the masses of contracts for cultivation of land.⁴⁸ Lastly, Ibn Qutlubugha further elaborates the argument first advanced in analogue 3: that the tradition has allowed economic necessity and general custom to overrule earlier doctrine, which in principle outlawed contracts exchanging

⁴⁷ Ibid. at fol. 185b. ⁴⁸ Ibid. at fol. 184a.

ill-defined potentiality. If such contracts had been allowed in the cases of lease and share-cropping, then they should also be allowed in the case of the grantee's renting out his administrative grant. Rental of the administrative grant must be allowed if the grant-holder is to enjoy his full proprietary right to profit commercially from the agricultural produce or urban rent yielded by the grant. Ibn Qutlubugha leaves us in no doubt that his formulation is sufficient to cover all the practices of his day, whereby military grantees entrusted the administration of their estates to agents and exchanged rights to grants among themselves.⁴⁹ Ibn Qutlubugha notes that so long as the imam does not challenge such practices, he has implicitly granted his permission for them and that, in these matters, what is common custom has the same force as that which has been explicitly stipulated.⁵⁰

Ibn Qutlubugha finds the best models for his argument in contracts governing slaves, figures who are both agents (as in the case of the slave trader and slave mother of her owner's child) and property (divisible into neck/essence, potential use-value/service, and commodity-value/fruits of labour). It is possible to draw such parallels because the basic term of the juridical lexicon for rental/lease, *ijara*, covers the service of persons, the goods and coins of commercial trade, and real property of all kinds.⁵¹ As noted above, the fact that so many of the analogues concern rights over slaves suggests that the law in this domain allowed the conceptualisation of complex rights to a potentiality in a manner more developed than the law of ownership of other objects, which was constructed around a bilateral contract of exchange between persons abstracted from social offices. That said, the laws governing slaves were not of mere antiquarian or doctrinal interest to Ibn Qutlubugha, himself the son of a freedman; they were also living realities. In an epistle on the topic of the social allegiance (*wala'*) of the son of a free woman and a freedman, he noted in the introduction:

⁴⁹ Ibid. at fol. 180b.

⁵⁰ Ibid. at fol. 180b and for the latter fol. 181a: 'li'anna al-ma'lum ka-'l-mashrut wa-ka-dhalika al-lawazim.'

⁵¹ The technical vocabularies of specific contracts are highly developed, and so a term governing the powers over persons in kinship and marriage relations is rarely employed in the context of contracts of ownership. But this is but a cursory observation, and more careful study is needed in order to determine the relation between terminologies of ownership and those of kinship/alliance. In the epistle in question the power to dispose of a good owned is at times phrased in terms of *wilaya*, the term employed for guardianship of an orphan or of a nubile person, cf. Qutlubugha, *Risala*, fol. 186a.

This kingdom is distinguished over others by its *jihad* against infidels, creatures of division and corruption. Hence the number of captives and slaves has grown as has inevitably the number of freed men and women. And so the social allegiance of those freed has become an important issue unlike the case in other kingdoms and countries.⁵²

CONCLUSION

The latter part of the main epistle makes clear to what extent Ibn Qutlubugha's formulation was the object of debate in his own day. In a subsequent epistle he defends his argument against a further challenge: the view that a military grant-holder should be regarded not as a co-proprietor with the treasury but as an agent of the treasury.⁵³ This, Ibn Qutlubugha retorts, would render the usufructuary possession of the cultivator continuous in the case of the grant-holder's death or dismissal.⁵⁴ By contrast, in Ibn Qutlubugha's view, when the grant-holder died or his grant was withdrawn, the rental contracts of the cultivators were legally renegotiable by the next grantee appointed. This epistle, written after the first, flatly rejects the interpretation of the grant-holder as agent or quasi-agent; rather than advancing a complex argument it then turns to an exposition of the categories of the *iqta'* in the eleventh-century jurist al-Mawardi's *al-Ahkam al-Sultaniyya*.⁵⁵ This long exposition serves by mere juxtaposition to emphasise the doctrinal antiquity of the *iqta'*. In this second epistle as in the first, Ibn Qutlubugha defends

⁵² *Fatava Kutlubugha*, Yeni Cami 1186/8, Süleymaniye Kütüphanesi, fol. 411a: 'faqa aidan hadhihi al-mamlaka 'ala sa'iri-ha li-kauni-ha maudi' al-jihad 'ala al-kuffar dhawi al-shiqaq wa-'l-fasad wa li-dhalika kathurat fi-ha al-sabaya wa-'l-ariqqa fa-kathurat bi-'l-darura al-muharrarun wa-'l-'itaq fa-kathurat fi-ha qadiyat al-wala' sha'at wa-'intasharat qissatu-hu wa dha'at'. (Note, the manuscript reads *faqa*, not *faqat*, as above.) Following this *fatwa* (fol. 411a–420b) concerning the *wala'* of a child of such a marriage is another *fatwa* discussing inheritance according to *wala'*.

⁵³ The copy of this epistle in the collection Laleli 951/3, Süleymaniye Kütüphanesi, fol. 169–75 immediately precedes the first epistle discussed above; it is in a difficult hand. Hence my reference here is to the manuscript *Al-jawab fi jawaz ijarat al-iqta'* in the Zahiriya collection 7470, Maktabat al-Asad, fol. 1–17, which is in the beautifully clear hand of the distinguished jurist, Muhammad 'Abdullah b. Ahmad b. Ibrahim al-Khatib al-Timurtashi and dated 981AH/1573–74CE.

⁵⁴ Ibn Qutlubugha, *Risala*, fol. 2b.

⁵⁵ Abi al-Hasan b. Muhammad b. Habib al-Basri al-Baghdadi al-Mawardi (d. 450AH/1058CE), *al-Ahkam al-sultaniya wa-'l-wilayat al-diniya* (Dar al-Kutub al-'Ilmiya, Beirut, n.d.).

the grant-holder's powers as free agent in making contracts with cultivators.

Ibn Qutlubugha's formulation was not long to survive the Ottoman conquest of Egypt. The important Egyptian jurist Ibn Nujaim (b. AH 926/1520CE), who wrote after the Ottoman conquest, attempted a kind of balancing act: he first accepted Ibn Qutlubugha's analysis of the relation between grant-holder and cultivator as one of rental but then proceeded to identify the nature of the grant-holder's right with Abu Yusuf's second definition of *iqta'* as entailing rights to the *kharaj* tax of the land, not to any part of its ownership.⁵⁶ This solution, while somewhat incoherent, appears a kind of compromise between a conception of subsidiary right in terms of property and one where such rights are thought of in terms of taxation and office. Baber Johansen has argued that Ibn Nujaim wrote in defence of the 'social circles and groups that had a vested interest in safeguarding of *waqf* land, private landed property and the other remaining structures of the Mamluk system of land tenure.'⁵⁷ He may indeed have done so, but with regard to the nature of the *iqta'*, he also appears to have met the Ottomans half-way.

It was for the Ottoman imperial muftis to try to work out a doctrinal solution coherent with Hanafite doctrine and with the practices of Ottoman rule constructed in the course of conquests first in Anatolia, then in the Balkans and Hungary and lastly in Syria and Egypt. In parts of Anatolia important rights to land had been accorded local elites (under the term *malikane-divani*, not to be confused with the later *malikane* institution) but throughout most of the conquered regions the Ottomans had confirmed the particular imposts paid by the cultivators in formal *kanuns*, within a thorough-going doctrine of state ownership of the *raqaba* of land. The *kanuns* governed the sets of rights and tax duties of subjects; every village and cultivator was in turn to be inscribed in the registers (*defters*) on which Ottoman rule rested ideologically as much as practically. According to this model of rule, if the *timari* grant-holder was delegated the right to administer the land and collect its revenue, the cultivator's right was also inscribed in the register (*defter*) of the administration.

⁵⁶ See his epistle on the *iqta'*, *Risalat al-iqta'at*, Izmir 811/9, Süleymaniye Kütüphanesi. In the catalogue the manuscript is given as Izmir 811/8 but in fact it is number 9 in the volume. The text of this epistle has been published in the collection *Rasa'il ibn Nujaim al-iqtisadiya* (Muhammad Ahmad Siraj (ed.), Dar al-Salam, Cairo, 1998).

⁵⁷ Johansen, *The Islamic Law*, at p. 87.

Ibn Qutlubugha will continue to be cited by jurists of the Ottoman period for his opinion that what the cultivator pays is a form of rent, but not for his analysis of the grant-holder as a co-proprietor with, rather than an agent of, the treasury. The great muftis in Istanbul of the sixteenth century, Kemalpaşazade and Abu 'l-Su'ud al-'Imadi, did not enter into the finer points of legal history in their justification of Ottoman administrative land law. Thus, Kemalpaşazade, mufti of Istanbul from 1525–34CE, does not address directly the question of whether the grant-holder has a proprietary right to the usufruct of land. He states that by the document of his appointment the grant-holder (*sahib-i timar*) holds a right to decide the land's use (*hakk-ı karar*) but then states that, according to the terms of the *kanun*, the grant-holder can sell the use-right (*tasarruf*) to the cultivator.⁵⁸ Not without contradiction, Kemalpaşazade grappled with the doctrinal difficulty posed by Ottoman administration of land, where the grant-holder collected a substantial fee, termed *tapu resmi*, on first transfer of land to a cultivator and where, thereafter, cultivators could transact their right to use of land subject to approval by the grant-holder but each time paying a *tapu* fee to the administrator on recognition of the transfer. Kemalpaşazade did not attempt to legitimate this practice in terms of Islamic doctrine, noting that it derived instead from the administrative law of the *kanun*.

His successor as *shaykh al-islam* of the Empire, Abu 'l-Su'ud, is renowned in scholarship for having resolved the dilemma of the legitimacy of such administrative practice in terms of Islamic *fiqh*. In fact Abu 'l-Su'ud states rather little concerning the nature of the administrator's (*timari's*) right, but his *fatwas* make clear that he regards the *timari* or *sahib-i arz* as holding an office where in return for part of the tax revenue he carries out tasks of administration of land in the best interests of the state.⁵⁹ Rather, it is the character of the cultivator's legal person and property right that Abu 'l-Su'ud will address in some detail. In what may well be his first formulation, Abu 'l-Su'ud followed earlier Hanafite doctrine in describing the cultivator's relation with the treasury as a faulty or quasi-rent (*ijara fasida/icare-i faside*) – faulty because for a valid lease

⁵⁸ See the *fatwa* transliterated in A. Akgündüz, *Osmanlı Kanunnameleri ve Hukuki Tahlilleri* (Hilal Matbaası, Istanbul, 1992), vol. IV, p. 84 and translated in C. Imber, *Ebu's-su'ud: The Islamic Legal Tradition* (Edinburgh University Press, Edinburgh, 1997) p. 120.

⁵⁹ This appears to result from the legal character, whom later jurists will refer to as a *na'ib* (deputy) or *wakil* (agent) of the treasury, not being doctrinally problematic and hence simply not requiring definition, unlike the right of the cultivator.

the duration of the rental contract must be specified whereas it is not here – and the dues cultivators pay for the tenure of use-rights (*tapu*) as a form of down-payment on the rent.⁶⁰ But in a formulation perhaps subsequent to and certainly repeated more often than the first, Abu 'l-Su'ud avoids the term rental (*ijara/icare*), presumably because this can entail the capacity to sub-let the use of land to others, rendering legally problematic the control over transactions between cultivators exercised by the grant-holder (*sahib-i arz*). So, in his second *fatwa* Abu 'l-Su'ud interprets the terms under which a cultivator receives his right in terms of delegation (*tafwid/tefviz*), or as a loan (*'ariya/'ariye*), or as an object held in trust (*wadi'ul'vedi'a*), legal categories which do not give the cultivator the power to transfer any part of the rights to land by a contract binding according to *fiqh*.⁶¹ This celebrated *fatwa* in fact only formally, and partially, resolves the issue. Because of the ideological centrality of the distinction of those who receive tax (the officers of state or *'asker*) from those who pay tax (the flock of subjects or *reaya*) Abu 'l-Su'ud marks off the grant-holder as an officer of the state as opposed to the cultivator who merely rents the use of the land (on a faulty contract). But the restrictions imposed by classical Ottoman administration on the power of the cultivator to sub-let or to leave his land led Abu 'l-Su'ud to adopt yet other idioms for the transfer in question: the grantee had simply lent or entrusted the land to the cultivator, or, drawing on the language of office, not property, the grantee had delegated the power to use the land to the cultivator. In short, in the most famous Ottoman legal interpretation, that of Abu 'l-Su'ud, the cultivator appears neither as fully enjoying a property right nor as fully holding an office, however subject, but as somehow vacillating between the two idioms of right.⁶²

⁶⁰ cf. Akgündüz, *Osmanlı Kanunnameleri*, vol. IV, p. 82: in the discussion of succession by son or daughter: 'kimesnesi kalmasa, âhara icâreye verilmek emr olunmuşdur. Tapu adına verilen akçe, ücret-i mu'accedir. Zaman-ı tasarrufları beyân olunmamağın icâre-i fâsidedir.' As Abu 'l-Su'ud wrote these *fatwas* in Turkish, both the Arabic and Turkish transcriptions of legal terms are given here to facilitate comparison with the Arabic of Ibn Qutlubgha.

⁶¹ Delegation (*tafwid/tefviz*) is a term used to describe the entire structure of government, likewise seen as a cascade of delegation from the summit. cf. Muhammad Salih Muhammad al-Timurtashi, *Fa'id al-mustafid fi masa'il al-tafwid* (ms. dated AH 1031/1624CE) Zahiriyah Collection 10493, Maktabat al-Asad.

⁶² Abu 'l-Su'ud makes quite clear that he aims to avoid the idioms of property right thus rendering null and void any contracts written by *ulema*: 'Mutasarrif olanlar,

In summary, Ottoman jurisprudence invariably treated the grantee as an officer of the state, even throughout the eighteenth century heyday of tax farming.⁶³ The rights of the cultivator, however, and especially with the growth of more commercial relations in agriculture in the eighteenth century, could be cast as a kind of quasi-property right. The cultivator's right to the use of land became virtually unlimited in time as it passed without fee to his son on death; it was regulated by law issued from the centre and was transferable to anyone other than his son for a *tapu* fee.

This interpretation forms the backdrop against which in the nineteenth century the rights of the grantee would be swept entirely out of sight and the proprietary rights of the cultivator strengthened into an increasingly full property right to the object 'land', conditional on the payment of tax.⁶⁴ Thus the closure in the nineteenth century of juridical debate concerning hierarchically disposed rights to state land would build on the Ottoman conceptualisation of the grantee or tax farmer as an office or agent of the state rather than, as in the fifteenth-century Mamluk text of Ibn Qutlubugha, a co-proprietor with the state that represented the Muslim community.

aslâ tasarrufât-ı mezbûreden şer'le hiç birine kâdir olmazlar. Eğer birisi birine hakk-ı kararın alub tasarrufın tefvîz etdikde, sipahi eğer câiz görürse, tasarrufa kâdirdir ve illâ değildir. Kudât, bey' ve şirâ hücceti vermek bâtıl-ı mahzûr. Anın gibi vâki olıcak sipahi izniyle fıldan şu mikdâr akçe alub yerinin tasarrufunu ona tefvîz edüb, sipâhi dahi ona tapuya verdi deyû hakk-ı kararın yazmak gerekdir. Vediat komak ve âriyet vermek, bir hükm-i şer'î icâb eder nesne değildir. Re'âyâ yerlerinin kullanmağa yâhud hifzetmeye bir kimesneye verib dilediği vaktin yine almağa kâdirlerdir'. Akgündüz, *Osmanlı Kanunnameleri*, vol. IV, p. 81.

⁶³ On the *malikane* see M. Genç, 'Osmanlı Maliyesinde Malikâne Sistemi' in his *Devlet ve Ekonomi* (Ötüken Neşriyat, İstanbul, 2000), pp. 99–147 and A. Salzmänn, 'An Ancien Régime Revisited: 'Privatization' and Political Economy in the Eighteenth-Century Ottoman Empire' (1993) 21(4) *Politics and Society* 393.

⁶⁴ For a fuller discussion of debates over Ottoman land law in late Hanefite *fiqh* see M. Mundy and R. Saumarez Smith, *The State of Property: Law, Administration and Production in Late Ottoman Southern Syria (1875–1940)* (forthcoming), chs. 2, 3.

CHAPTER SIX

GEDİK: A BUNDLE OF RIGHTS AND OBLIGATIONS FOR ISTANBUL ARTISANS AND TRADERS, 1750–1840

Engin Deniz Akarlı

Law plays an important role in society not only in the regulation of human relations and transactions but also in providing a sense of order and continuity amid change. As such, law works as a tradition in its theoretical as well as practical orientation.¹ It makes a claim to be the keeper of time-tested (historically rooted) conventions and principles that serve the good of society. Simultaneously, however, law has to adjust itself to changing circumstances, to demonstrate the relevance of the principles and guidelines with which it works and to continue to function as a shared reference in society. One may argue that without the coercive power of state authority, a legal tradition or system would achieve little. However, my interest lies in that ‘little’ space, where law can produce peaceful solutions to problems and conflicts based on its own conceptual and procedural resources.

Instances that test a legal tradition’s capacity in this regard can shed some light on the ways in which law works or fails to work as an autonomous force mediating between change and continuity in society.

¹ I use the concept of ‘tradition’ along the lines articulated by Alasdair MacIntyre. See his *After Virtue* (University of Notre Dame Press, Notre Dame, IN, 1988), esp. pp. 349–403, and ‘A Partial Response to My Critics’ in J. Horton and S. Mendub (eds.), *After MacIntyre* (University of Notre Dame Press, Notre Dame, IN, 1994), pp. 282–304. Compare with J. Horton and S. Mendub, ‘After Virtue and After’ in *ibid.* at pp. 11–14. Conceiving ‘tradition’ as the opposite of ‘modernity’ is misleading. Modern methods of inquiry and practices, too, are built on traditions. I use ‘modern’ historically, as corresponding to the modern era.

Several articles in the present volume, including mine, discuss such instances within the realm of property relations, which are particularly vulnerable to developments in society. Most of the articles are about or written with an eye to modern Western legal practices. In an effort to offer glimpses at another legal practice, I discuss a particular development involving ownership relations under the influence of the Islamic legal tradition in Ottoman Istanbul in a period when that tradition encountered difficulties in regulating change. Let me underline from the beginning a few of the similarities and differences that I see between the Ottoman and modern Western experiences as based on my own research but keeping in mind the broader issues discussed in this volume.

Indeed, the challenge to respond and adjust to the present by adapting historically rooted concepts to the present in logically coherent patterns appears to be a shared feature of legal systems (or comparable practices). Given the close (but not exclusive) connection between property and economic relations, the legal concepts governing the former become vulnerable to fluctuations and changes in economic life, particularly in highly or fully commercialised environments. Normally, legal institutions play a crucial role in regulating property relations. While fulfilling this role, they also serve as a channel through which legal norms spread out in society, influencing the expectations, positions, and arguments of the parties to a dispute. This capacity to inculcate and implement norms seems to be an important source of the relative autonomy of legal institutions. As already indicated above, legal institutions try to maintain their autonomous influence by responding to change without fundamentally compromising the integrity of the legal tradition that informs them. Some of the techniques that develop within each major legal tradition to respond to this need are hermeneutic feats, particularly in the realm of property relations. Such similarities among the techniques of adjustment and reinterpretation that develop within different legal traditions may be quite instructive about the common (perhaps intrinsic) features of legal institutions and reasoning.

The same techniques may also reveal, upon close critical reading, much about the social and intellectual or ideological tensions they address. In comparisons across cultures, epochs, and legal traditions, however, we have to be sensitive to contexts and contingencies, if only to better appreciate the enormous richness of human experience. In this

regard, the fundamental differences between the Ottoman-Islamic and modern Western legal traditions may be as instructive as their similarities. One such difference is in their respective concepts of proprietorship regarding immovable objects. Some of the problems of the modern Western legal tradition appear to have been related to the expansion of a singular paradigm of real property ownership to cover ever more complex instances of ownership relations. The modern Western paradigm postulates an exclusive entitlement of a 'person' to a 'thing' and implies an insular, individualist and absolute sense of ownership 'right'. Expansion of the paradigm entails elaborate schemes of personification and reification, while trying to maintain the total control of a neatly defined 'person' as subject over an equally neatly defined 'thing' as object.²

In the Ottoman-Islamic legal tradition, the concept of proprietorship was likewise exclusive in principle, but it did not characteristically provide the owner with either absolute or singular rights over an immovable object. The right to actualise the use-potential of an immovable object was as valid as the ownership of that object in itself. Simply put, 'property' (as object of ownership) could be a use-right (an abstraction), a tangible thing, or a combination of both. We may see 'reification' in the association of an abstract notion with a tangible thing. We should not overlook, however, that reification in a modern Western context models an abstract object of property after a tangible one, perpetuating a particular notion of property in the process, along with a world-view in which that notion is embedded. In the Ottoman context, the intangible co-existed along with the tangible as an already legitimate object of ownership. This plural concept of proprietorship informed the Ottoman judges and jurists and allowed the formation of multifold property relations around the same immovable 'thing'. To the extent that the 'thing' could be useful in different ways and different agents could actualise these potentials, the law would even allow multiple use-rights of the same 'thing'. Furthermore, while the economic utility of an object of ownership was crucial in defining its use-value, its other possible uses (for pious, public, or social purposes, for instance) were also taken into

² In addition to the contributions to this volume, see the articles in John Brewer and Susan Staves (eds.), *Early Modern Conceptions of Property* (Routledge, New York, 1995). For the relationship of the concepts of 'self' and 'right' to paradigms of property in modern Western context, also see Wai Chee Dimock, *Residues of Justice: Literature, Law, Philosophy* (University of California Press, Berkeley, 1990).

account. Thus, the matrix of property relationships revolving around an (immoveable) object tended to become quite complex in an Ottoman context.

The courts co-ordinated, specified, and regulated the respective rights of various parties in an object along with their rights and responsibilities toward each other over that object. The principle legal device on which the courts relied to fulfil this task was contractual arrangements. The courts oversaw the conformity of contracts to doctrinal and procedural legal principles, while the jurists shouldered the task of adapting the concept of contract to changing needs. The original model for contractual arrangements was the sales contract. The jurists expanded the model to cover a great variety of relationships. It became possible, for instance, to form, through contracts, partnerships and corporate networks or associations, which then could be a party to a contract. Likewise, trustees of charitable foundations and representatives of the government (in its capacity as the custodian of the public treasury) were recognised as entities capable of entering into proprietary contractual arrangements.

Since the theory attributed the capacity to undertake a contract to individual human beings in principle, it is possible to speak of ‘personification’ by legal act in the case of contracts that involved networks, foundations, and the government. However, we should keep in mind that the ‘person’ in the Ottoman-Islamic legal practice was not an absolute owner with an absolute right over a thing. Rather, an owner was a person who had certain entitlements as well as obligations and responsibilities, the scope of which might change in time through negotiations with other similar ‘persons’. Contracts served as the means by which law sorted out differences regarding respective rights over the same object. The contracts altered the subjects, the objects, and the law itself. Actors acquired legal *personae* constructed around their rights and responsibilities with respect to each other as well as their rights over objects. Objects acquired new layers of meaning and value embedded not so much in their substance as in their connection to other tangible and intangible objects, as well as to human capacities and competencies. In the process, the jurists and the judges expanded basic legal concepts and categories to accommodate new situations. Their efforts to maintain the integrity of a legal tradition as well as its relevance to society should tell us something about what law does in society, how it does it, and where it may fail. I will try to illustrate my point by means of a dense

historical account of the development of property relations around the concept of *gedik*.

GEDİK AND THE OTTOMAN LEGAL SYSTEM

Gedik is a concept that acquired, in the course of the eighteenth century, a multitude of meanings representing various things and rights to which the artisans and traders of Istanbul became legally entitled. At first, *gedik* legally meant merely the capital assets necessary to practise a trade. By 1840, *gedik* ownership also implied having the skills that qualified a person as a master in a specific trade, being a senior partner in a group of artisans or traders that had the exclusive right to practise that trade, and entitlement to the use-right of a work premise associated with the same group. Thus, possessing a *gedik* connected an individual to things, sites, and networks while also endowing him with certain rights and responsibilities. These rights and connections had precedents in Ottoman urban and legal history, but their gradual convergence under one legally recognised concept that applied to the great majority of the artisans and traders was a development peculiar to the period from about 1750 to 1840.

I will try to explain this development by focusing on the situation in Istanbul, where cases related to *gediks* preoccupied the courts, more so than in other major Ottoman cities. In addition, I hope to shed light on the Ottoman legal system and culture on which artisans and traders relied heavily in defending their interests. The *gedik* cases brought artisans and traders together with many other parties in courts, where they argued and negotiated their respective rights and claims regarding access to commercial real property, rent shares and benefits, credit, taxes and fees, distribution of implements and work permits, and inheritance rights. In the process, artisans grouped and re-grouped, forming networks and defining and re-defining their corporate identity and thus legal *persona*. The deals and settlements that emerged thereby had legal repercussions far beyond the period covered here. I will briefly touch upon the new turn that *gedik* ownership took after 1840. However, a detailed account of the developments after 1840 calls for a separate article, at the least, for it involves a quite different set of actors acting in a quite different environment that was governed by the ethos and laws of modern capitalism, or rather dependent capitalism in the Ottoman case. Here I will concentrate on the period when artisans and traders played the lead role in loading the concept of *gedik* with multiple

meanings, operating in an environment where the Ottoman-Islamic legal ethos still provided the cues.

This was a troubled period of Ottoman history, culminating in a series of costly internal and external wars from the 1770s through the 1830s. Hoping to turn the tide, the central government focused its attention on extensive military reforms and on bringing the provinces under Istanbul's tighter control. In order to raise the urgently needed funds to finance reforms, the government resorted to internal borrowing against future revenue, currency debasement, and similar inflationary fiscal measures. These policies aggravated the economic problems affecting the empire and caused new upheavals in the provinces. Istanbul was caught in between two currents. On the one hand, increasingly prosperous European cities and even several Ottoman provincial capitals were able to divert from Istanbul the raw materials and provisions that it used to attract and that its large population of about 375,000 people³ still needed. On the other hand, the wealth that Istanbul continued to attract from around the empire generated demand for new and mostly luxurious imports. These developments added to the inflationary pressure generated by the government's fiscal policy, and adversely affected artisans and traders.⁴ Artisans turned to the courts to defend their interests against each other, the proprietors of their shops, and other parties. They organised themselves and relied on political means as well in order to obtain what they wanted from the legal system, as should be clear from the following pages. However, the artisans' extensive and willing reliance on the legal system regarding a broad range of issues deserves special attention. Since ownership of assets and other relationships revolving around the concept of *gedik* constituted a good part of the legal disputes and arrangements that involved artisans, a closer look at these cases should cast light on artisans and traders' expectations of the law.

³ Donald Quataert, 'The Age of Reforms, 1812–1914' in Halil İnalcık and Donald Quataert (eds.), *An Economic and Social History of the Ottoman Empire, 1300–1914* (Cambridge University Press, Cambridge, 1994), p. 781. Compare with Stanford Shaw, 'The Population of Istanbul in the Nineteenth Century' (1979) 10 *International Journal of Middle East Studies* 265. Also see Kemal Karpat, *Ottoman Population 1830–1914: Demographic and Social Characteristics* (University of Wisconsin Press, Madison, WI, 1985), pp. 86–105.

⁴ Y. Cezar, *Osmanlı Maliyesinde Bunalım ve Değişim* (Alan Yayıncılık, İstanbul, 1986); Bruce McGowan, 'The Age of Ayans, 1699–1812' in İnalcık and Quataert (eds.), *An Economic and Social History of the Ottoman Empire*, at pp. 637–743, and E. Akarlı, 'Ottoman Historiography' (1996) 30 *Middle East Studies Association Bulletin* 33–37.

A few distinctive aspects of the Ottoman legal system and culture need to be underlined as a background. The Ottoman courts recognised three complementary sources of right, namely the Shari'a, the sovereign's regulatory power, and custom. The Shari'a, or the Islamic legal tradition, constituted the ultimate source of right and legitimacy. The Shari'a involved an elaborate system of legal thought (*fikih*) and certain general principles, rules, and provisions guided by that system.⁵ All Ottoman kadis, that is judges, were trained in Islamic jurisprudence, and the kadi courts constituted the heart of the Ottoman legal system. Several branches assisted each major kadi court. The deputy judges (*naibs*), who headed these branches, were responsible to the kadi of the district (*kaza*). The courts functioned as notary publics as well, registering a variety of contractual agreements, including the 'custom' by which a given group of artisans agreed to conduct their affairs among themselves.

Building on the Islamic legal tradition, the Ottomans conceptualised the Sultan as a sovereign whose primary task was to uphold the Islamic legal principles and to serve as the final recourse in reconciling and settling conflicting rights within the jurisdiction of his state. The Ottoman Sultan was entitled to issue regulations that would help facilitate the fulfilment of this task, particularly in matters that pertained to public benefit (*maslahat*) in general. The imperial court or *divan*, the highest executive organ of the government, assisted the Sultan. Two of the highest-ranking judges of the Ottoman judicial hierarchy were members of the *divan*. They advised the court in legal matters and made up the legal branch of the *divan* that worked as a high court. The two senior judges heard the appeals against the decisions of regular district courts. In addition, they heard the cases and petitions that the kadis or the people submitted to the *divan* because of the pertinence of these issues to public interest. The petitioners presented their views, claims, and documentary evidence to the *divan*. The judges checked the

⁵ The best introduction to the Islamic legal tradition is Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (E.J. Brill, Leiden, 1999), esp. pp. 1–76. For the best introduction to its historical development, see Wael Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh* (Cambridge University Press, Cambridge, 1997). For an introduction to Ottoman practice, see Haim Gerber, *State, Society and Law in Comparative Perspective* (State University of New York Press, Albany, NY, 1994) and *Islamic Law and Culture, 1600–1840* (E.J. Brill, Leiden, 1999), along with my review of the latter in (2000) 7 *Islamic Law and Society* 403–407.

evidence against government records and called in witnesses and experts as needed. The grand vizier, who presided over the *divan* and led discussions on administrative and policy matters, could not interfere in the judicial process once the *divan* turned to judicial issues, although he might be present at the hearings. At any rate, the judges heard the majority of legal cases brought to the *divan* in regularly held special sessions, with due assistance from other high-ranking and experienced judges, if need be.

The Sultan's approval was necessary for the implementation of the *divan's* judicial decisions. These decisions were, therefore, formulated as recommendations to the palace and put into effect after the Sultan ratified them. The Sultan's ratification turned a court decision into an imperial decree (*emr-i ali*), which the regular courts had to observe in the relevant cases that came before them. This sultanic authority, then, constituted a second source of right in the Ottoman legal system. A Sultan could issue decrees on his own as well. However, the established practice obliged the sultan to use his prerogative with due advice and guidance from senior experts of the legal tradition, particularly in matters that pertained to the civilian population.⁶

Finally, the Ottoman legal system allowed a large degree of autonomy to various segments of the population in handling their affairs and internal differences according to their own custom (*örf* and *adet*). These segments ranged from tribes, villages, residents of the same urban quarters, and artisan groups in the marketplace to religious communities (*millet*s) and provinces at large. Although custom bound only the network of individuals that upheld it, the recognition of custom as a source of right effectively provided the same individuals with a legal *persona*. They acquired a legally recognised collective identity and the right to pursue their interests jointly or through their officially recognised representatives.

The judicial branch of the imperial council (*divan*), served as a higher court of sorts in disputes that pertained to public interest, in addition to providing legal council on administrative decisions and regulations. Thus, the files of the legal cases that came before the judges of the *divan* shed light on issues that were of sufficient importance to be brought

⁶ For the *divan*, see Ahmet Mumcu, *Divan-ı Hümayun* (Birey ve Toplum Yayınları, Ankara, 1986). Also see C. Fleischer, *Bureaucrat and Intellectual in the Ottoman Empire* (Princeton University Press, Princeton, 1986), esp. pp. 286–92, and M.A. Ubicini, *Letters on Turkey* (reprint, of J. Murray, London, 1856, 2 vols., New York, 1973), vol. I, pp. 122–32.

before the highest judicial authorities as well as issues that plaintiffs had been unable to resolve either by their own means or through the mediation of the kadi courts. Furthermore, these files normally included detailed information about the history of each case and documents indicating the evidence on which the judges based their final decision. As such, the judicial files of the *divan* constitute a rich source on the contexts and practices through which the meaning of law and justice was negotiated and interpreted.

At all levels of the legal process, the Ottoman legal tradition aimed at bringing together the parties that disagreed or were likely to disagree in order to help them resolve their real or potential differences through negotiations in light of certain broad legal principles and norms. Thus, when a group or network of individuals failed to resolve disputes by its own means, its representatives came to the judges of regular courts (*naibs* and *kadis*) for assistance. When these judges failed to resolve the problem or when the case transcended their jurisdiction by virtue of requiring a decision based on the public benefit principle (as will be illustrated below), the task fell upon the senior judges of the *divan*. (In distant provinces, chief judges appointed by the centre fulfilled a similar task.) Both regular and *divan* judges first tried to reconcile the petitioners or litigants. Indeed, an Ottoman judge was primarily an arbiter and mediator. Even when he had to settle a case by resorting to his decisive legal authority, he still formulated the final sentence in the form of a contractual agreement guaranteed by all the sides involved.

In short, the Ottoman legal tradition was accommodational and not confrontational. Its fundamental supposition was not that only one side could be in the right but that parties to a conflict should make the effort to reconcile their differences toward a harmonious co-existence. The courts' primary task was to facilitate this reconciliation in light of certain legal guidelines, principles, and norms that were held to be universally relevant. As such, the courts made and re-made the laws, in the practical sense of the word as binding provisions, with the participation of those actors to whom the provisions would apply. Court cases related to *gedik* claims and rights illustrate these points. In this chapter, I rely mainly on the judicial decisions of the imperial court.⁷

⁷ The documents I use come from three sources: the first is a register of imperial decrees pertaining to Istanbul artisans and traders that was prepared for Kara Kemal, the Minister of Provisions responsible for the organisation of the artisans and traders in the Ottoman war cabinet of 1915–18. The register is abbreviated as EEA in the

THE RISE OF GEDIKS

By the early eighteenth century, cases regarding Istanbul artisans and shopkeepers had become one of the major preoccupations of the *divan* judges. Disputes and arrangements revolving around the concept of *gedik* were to acquire a prominent place in these cases. ‘Slot’ is the most common literal meaning of ‘*gedik*’. A common derivative of the word, *gedik-li* (person with a slot) implies seniority, tenure, and regularity of position. Until the eighteenth century, the concept of *gedikli* was used for certain administrative and military officials in Ottoman parlance, but rarely for artisans or traders.⁸

The concept of *gedik* as it applied to artisans and traders was probably related to the better-established word *gedikli*, with its connotations of tenure and seniority. Initially, the explicit meaning of *gedik* or ‘slot’ in Ottoman legal documents was an artisan or trader’s tools and equipment. This basic legal meaning remained carefully preserved in legal documents even when *gedik* ownership acquired new implications. At a time of slow technological change, when the same means of labour passed from one generation of master artisans to the next, linking the tools of a trade to seniority and tenure would make sense. However, *gedik* also signified a specific ‘slot’ in the marketplace in a tangible sense. In Istanbul, as in many other Near Eastern towns, artisans and shopkeepers of the same calling tended to group in the same buildings or streets of the city’s different business centres in many lines of economic activity.

These groups were called *esnaf* (literally, ‘groups’) or *taife* (a circle of a specific group of individuals) and managed their own affairs under the

notes. The second source is the so-called *Cevdet* collection of imperial decrees in the Ottoman Prime Ministry Archives in Istanbul. Most of the documents I use come from the *Cevdet-Belediye* (CB) section of this collection. I use a few files also from the *Cevdet-İktisad* (CI) and the *Cevdet-Zabtiye* (CZ) sections as well. Finally, I use published works that include imperial decisions on Istanbul artisans. Most important of these works are Ahmed Kal’a *et al.* (eds.), *İstanbul Ahkam Defterleri: İstanbul Esnaf Tarihi* (İstanbul Büyük Şehir Belediyesi, İstanbul, 1997–98) and Osman Nuri, *Mecelle-i Umur-i Belediye* (Matbaa-i Osmaniye, İstanbul, 1914–22), vol. I. In the following references, the dates of documents are indicated in parentheses in their Gregorian equivalents.

⁸ Historians agree that the use of the concepts of *gedikli* and *gedik* among or in relation to artisans and traders began to spread in the eighteenth century. See, e.g., Nuri, *Mecelle*, vol. I, p. 652, and Süleyman Sudi, *Defter-i Muktesid* (Mahmud Bey Matbaası, İstanbul, 1306, [1888–89]), vol. I, p. 96. Contemporary documents addressing the issue corroborate this observation. See, e.g., the imperial decree of 1814 in EEA pp. 187–9.

leadership of elderly masters and elected stewards.⁹ The capital assets of these groups remained at given spots reserved for their trade by custom. A person who qualified to become a master of the trade acquired one of the spots from an established master or an additional place was created for him with the permission of the established masters. Otherwise, he remained an employee or an inferior partner of one of the established masters.¹⁰ Ownership of implements, then, not only enabled an experienced artisan to become his own boss as a fully-fledged master, but it also provided him with a slot among a group of fellow masters and thereby with a work place at a specific location in the marketplace.

Practical considerations and custom sustained these quite well established, although flexible practices. Problems emerged, but artisans and traders dealt with them with relatively little involvement of the higher court. The volatile circumstances that characterised the period under consideration, however, instigated artisans to articulate, refine, re-define, and defend their practices. ‘*Gedik*’ served them as a convenient concept and its application to their capital assets gradually spread. The documents at hand make it clear that the need to assure creditors in certain lines of activity initiated the trend.

GEDİK AS SECURITY FOR CREDIT

Initially, some master artisans and traders began to register their tools and equipment as *gedik* with their stewards and used the *gedik* certificates thus obtained in order to maintain their credit with the merchants who supplied Istanbul with raw materials and other merchandise. Apparently, the amount of an artisan’s debt to a merchant was written behind the *gedik* certificate. Sometimes, the merchant kept the certificate himself until the *gedik* owner paid his debt. This feature of *gedik* as security against a trader or artisan’s obligations to merchants retained its significance to the end of the period covered here.

An artisan could use his assets as a security for credit and other fiscal obligations because he owned these objects as things and the right to use them. In Islamic legal terms, he owned the thing itself (*ayn*) in

⁹ Nuri, *Mecelle*, vol. I, pp. 479–976, is still the standard introduction to Istanbul *esnaf*. For a good review of the literature, see Eujeong Yi, ‘The Istanbul Guilds in the Seventeenth Century: Leverage in Changing Times’ Ph.D. dissertation (Harvard University, History Department, 2000). cf. Ahmet Kal’a, *İstanbul Esnaf Birlikleri ve Nizamları* (Büyük Şehir Belediyesi, İstanbul, 1998).

¹⁰ See n. 42 below.

its substance (*raqaba*) as well as the right to enjoy the potential benefit (*manfa'a*) that was expected to accrue from its use (*tasarruf*). This convergence of what can be called the bare ownership and the use-right in an artisan or trader's relationship to his assets, entitled him, by Islamic legal (*shar'i*) principles, to sell, lease, mortgage, and donate his assets and pass them on to his heirs. Consequently, he could also pledge them as security. However, an individual artisan's capacity to conduct such transactions depended as much on his participation in a group and that group's relations with other networks that made up the human tapestry of the marketplace. The disputes that emerged in certain lines of economic activity over *gedik* transfers illustrate the point.

First, the wholesale merchants who supplied the artisans and traders of Istanbul with raw materials and provisions brought from afar began to complain, particularly when the problems concerning the provisioning of Istanbul intensified during Selim III's reign (1789–1807). They found it harder either to collect their money from the artisans and traders or to pin down their debtors, because the latter could freely sell or mortgage his assets and then disappear. Collection of the debt from a deceased artisan's heirs proved equally difficult. Customarily, these merchants supplied items to the *esnaf* on credit. Apparently, the endorsement of a *gedik* certificate to a merchant in return for credit did not prevent artisans from abandoning an unprofitable business to seek their fortune in another town. Besides, some artisans managed to sell or mortgage their assets to a third party without a written proof of ownership. Under these circumstances, the merchants put pressure on artisans as well as the government in order to make arrangements that would oblige the masters of a specific trade group to be collectively responsible for each other's debts and obligations, on the one hand, and would enable the courts to intervene more effectively in *gedik* transactions in order to protect the interests of the creditors, on the other. Merchants petitioned the *divan* requesting that each group of artisans and traders with whom they dealt stand surety for one another and neither transfer their assets nor change their shops without the knowledge of the Istanbul court. When a trader died, fled, or wanted to sell, rent, or pledge his assets, the court should see to it that first the merchants' lien on these assets be cleared or guaranteed.¹¹

¹¹ For grocers see EEA pp. 54–9 (1801–64) and CB 7598, 1st doc. (1802–16); sellers of rice and provisions CB 7598, 4th doc. (1808–13); sellers of soap CB 7598, 19th doc. (1802), CB 23 (1831), and EEA pp. 36–9 (1833); for bakeries and flourmills CB

Secondly, certain groups of artisans and traders wanted similar surveillance of the transactions and transfers involving their *gediks* for reasons of their own. They complained that the sale, lease, and transfer of the *gediks* by the owner, his creditors, or his heirs to people who were unqualified to practise their trade or who wanted to convert the slot into a different business seriously harmed the integrity of their group as well as the reputation, credibility, and very livelihood of each master. The masters argued, typically, that the falling of one of their *gediks* into the hands of an incompetent outsider harmed them all. These outsiders, who knew neither their custom nor trade, cheated the populace at large (literally, *ibadullah*, ‘the servants of God’) and the merchants alike, according to the complainants. This situation undermined the integrity as well as the credibility of the group as a whole and discouraged the merchants from supplying the necessary raw materials and commodities. Shortages followed, prices increased, the populace suffered, and the groups became scattered, impoverished, and, last but not least, unable to fulfil their obligations to the government. The masters agreed to be collectively responsible for each other in their obligations to merchants or government offices if the masters themselves decided, in accordance with the custom of the group, who would acquire one of their *gediks*.¹²

1047 (1780), CB (1774–1808), CB 1177 (1792), CB 653 (1796), CB 260 (1799), CB 1167 (1777–1805), CB 5437 (1810), and compare with CB 3279 (1828) and CB 4370 (1835). See CB 1105 (1791); EEA pp. 251–2 (1794), and Nuri, *Mecelle*, vol. I, p. 655 (1805), among others, for the importance Selim III attributed to protecting the merchants. For shortages, see S. Shaw, *Between Old and New: The Ottoman Empire under Sultan Selim III, 1789–1807* (Harvard University Press, Cambridge, MA, 1971), pp. 175–6 and 178.

¹² The following cases illustrate these points: the case of barbers EEA pp. 288–9 (1730–48); the jewellers of the Old Bazaar CB 6033 (1742); the leather dressers/sellers of the Mercan Market EEA pp. 273–4 (1774); silk cloth weavers CB 7598, 3rd doc. (1811); sellers of cups and gifts imported from Europe EEA pp. 233–7 (1793–96) and CB 7598, 7th doc. (1808–14); the moneychangers of the Valide Hanı CB 1064 (1794); a group of traders dealing in imported cotton cloth EEA pp. 218–20 (1803); sugar sellers EEA pp. 61–5 (1805–44); raw cotton crepe weavers EEA p. 22 (1808, 1840–62); gauze head kerchief and linen cloth sellers EEA pp. 203–5 (1762–1810); cotton yarn and silk cloth weavers EEA pp. 145–50 (1831 based on previous decisions), and CB 7598, 3rd doc. (1811). Also see the documents mentioned in n. 12 above. Compare with the cases of the money changers and silversmiths in CB 350 (1763), and the silver thread-makers working for the Imperial Mint in CB 480, 411, 381, 15, 43, and 5534 (1759–1813).

The custom of the group mattered particularly about the transfer of *gediks* to heirs. Considerable differences existed among groups in this respect. *Gedik* was in principle private property, hence its inheritance would normally follow the relevant stipulations of the *Shari'a*. However, the Ottoman courts allowed special arrangements in this regard, taking into account religious differences, the nature of liens on the buildings in which *gediks* stood, and the special clauses of the tenancy agreements between the proprietors of these buildings and *gedik* owners. Thus, in case of certain groups, only the sons or only the sons and daughters of a deceased master could inherit his *gedik*. Notwithstanding these differences, almost all the groups who sought a collective control over the transfer of the tools and assets peculiar to their trade underlined that the right to inherit a *gedik* represented merely an entitlement to its 'fair price' (*semen-i misil*) and not to its use as such. The steward and the elders should see to it that the tools and assets were sold to a deserving, qualified (*ehil*) person at a fair price, and the sum paid to the designated heirs after the deduction of the debts on that *gedik*. However, a son who qualified to become a master in his own right in the same trade should have priority in acquiring the *gedik* of his deceased or retiring father.

Both the merchants and the artisans came to the *divan* because the arrangements they desired set restrictions to proprietorship rights, in this case, to an individual trader's rights over his assets. As such, their requests compromised a basic tenet of the Islamic legal tradition and called for justification in terms of another basic principle, namely, that of public benefit (*naf'an lil-'ibad*, literally, 'for the benefit of the servants [of God]'). In this particular context, public benefit involved, above all, assuring the flow of necessities at reasonable prices to God's servants as well as assuring that both the merchants and the artisans remained able to pursue their vocation and maintain their livelihood.

The arrangements that made a group collectively responsible for its members' fiscal obligations promised to benefit the government as well. Normally, the government dealt with the stewards of the existing groups or with individual artisans and traders in collecting taxes or to assure the prompt delivery of services and goods contracted to certain artisans or traders. However, the shortages that affected the markets created problems in both regards during the period under consideration. Convergence of the interests of the artisans and the merchants, who were similarly affected by the volatility of the markets, enabled the government to secure its own interests as well without forcibly imposing regulations on the artisans.

Many of the agreements reached by the arbitration of the *divan* judges included clauses about the fees, dues, and services owed to the government. A stone-mason's assets, for instance, were treated as security against the credit extended to him by merchants who brought raw marble and other stones to Istanbul, on the one hand, and against the services he was expected to provide at the imperial construction sites, on the other.¹³ Likewise, the assets of the bakeries and the flourmills were security against the grain delivered on credit to their owners by the grain merchants and imperial granaries.¹⁴ Wine shop owners' assets were the security against the alcoholic beverage tax (*zecriye*) levied on their business,¹⁵ and those of a tobacconist against the dues he owed to the Department of Mines.¹⁶

Where the interests of the government, merchants, and artisans converged, as in the cases above, the *divan* judges' task was relatively simple. After ascertaining that the master artisans in a group unanimously agreed on the stipulations concerning the transactions related to their assets and other relevant internal affairs of the group, the judges recommended the approval of the agreement. The imperial decree issued to that effect provided the agreement with legal force at all levels of the judiciary process. As such, each decree specified and regulated the rights and responsibilities of the constituent members of the relevant group with respect to each other and to external parties, legally reinforcing the corporate personality of the group.

Thus, the judicial process helped reconcile the good that different individuals and networks expected from an object, thereby re-defining the object itself. The decrees set certain restrictions to an individual master's proprietorship rights over his *gedik* as 'tools and assets' but also enhanced its value as security for credit and other fiscal obligations. The knowledge that the assets in question were in the hands of a master artisan who was qualified to make good use of them added to their plain market value. Likewise, the fixed address of the master artisan, the joint commitment of the masters of a group to stand surety for each other's financial obligations, and the new regulations about the registration of *gedik* transactions, provided the creditors with an additional sense of security. Simultaneously, the same legal arrangement reinforced the

¹³ EEA pp. 35–6 (1832, in reference to 1780); cf. CB 524 (1763).

¹⁴ CB 117 (1792); CB 1047 (1780); CB 1064 (1794); CB 653 (1796); CB 260 (1789). Also, Nuri, *Mecelle*, vol. I, pp. 786–98 (1798–1836).

¹⁵ CB 735 (1805–07), and EEA pp. 162–4 (1816).

¹⁶ EEA pp. 263–5 (1762, 1778); CB 1387 (1795).

legal *persona* of a group not only by articulating the joint rights and responsibilities of its masters but also by establishing a legally recognised connection between the group and the specific work premises associated with the group in the marketplace. This last implication of *gedik* ownership became dominant along with the intensification of rent disputes over the years.

RENT DISPUTES

In Istanbul, most of the buildings where artisans worked belonged to *vakıfs* (pious foundations), which helped finance a broad variety of religious, cultural, and public services, ranging from mosques of all sizes and schools at all levels, to fountains and aqueducts. According to Islamic law, *vakıf* property constituted a distinctive category and deserved the special attention of jurists by virtue of being devoted to good deeds pleasing to God. *Vakıf* property was deemed inalienable and to be rented for short terms at a ‘fair rent’ determined by the current market rate. However, making use of a strong, though not unanimous, interpretation of the legal tradition, the Ottoman jurists permitted special arrangements that allowed perpetual tenancy on *vakıf* property in order to encourage the tenants to help ameliorate *vakıf* revenues when *vakıf* property had become dilapidated and the *vakıf* lacked the means to restore it. The jurists based these arrangements on the fundamental legal supposition that a tangible contribution to the value of a real property provided the contributor with a right to perpetual or ‘fixed’ tenure (*hakk-ı karar*), if the owner agreed to the contribution.¹⁷

The frequent fires and earthquakes that affected Istanbul made such special arrangements particularly relevant for its innumerable *vakıfs*. Indeed, the devastating earthquakes and fires of the late seventeenth and the eighteenth century¹⁸ incited the government to encourage the so-called *mukataa* and *icareteyn* contracts between the *vakıfs* and their

¹⁷ J.R. Barnes, *An Introduction to Religious Foundations in the Ottoman Empire* (E.J. Brill, Leiden, 1986); G. Baer, ‘Hiq’, *Encyclopaedia Islamica*, New Edition, Supplement; A. Akgündüz, *İslam Hukukunda ve Osmanlı Tatbikatında Vakıf Müessesesi* (Türk, Tarih Kurumu, Ankara, 1988), pp. 401–16; Elmalılı Hamdi Yazır, *Vakıflar* (N. Öztürk (ed.), (Türkiye Diyanet Vakfı Yayınları, Ankara, 1995), and H. Hatemi, *Medeni Hukuk Tüzel Kişileri* (İstanbul Üniversitesi Hukuk Fakültesi Yayınları, İstanbul, 1979). For the fair rent principle, also see B. Johansen, *The Islamic Law and Land, Tax and Rent* (Croom Helm, London, 1988), pp. 106–17.

¹⁸ Nuri, *Mecelle*, vol. I, p. 1149 *et seq.*

prospective or existing tenants in an effort to restore the dilapidated *vakıf* properties.¹⁹ In both of these contracts, the tenant paid a significant down payment and a pre-fixed annual or monthly rent to the *vakıf*. In a *mukataa*, the down payment might be, at least in part, a tangible, immovable, and valuable addition to the basic *vakıf* property, such as buildings, for instance. If the trustee of the *vakıf* had approved the additions explicitly, the tenant enjoyed their near-full proprietorship and, consequently, a perpetual use-right over the *vakıf* property proper as well, so long as he (or she)²⁰ continued to pay the periodic rent. He could sell, pledge, or endow his additions to the *vakıf* property as he wished, whereas he still needed to pay a fee to transfer his use-right over *vakıf* property. The tenant's ownership as well as use-right passed to his legitimate heirs. If he lacked heirs, the basic property reverted to the *vakıf* but the additions to it accrued to the *beyt ul-mal*, that is the public treasury.

In case of an *icareteyn* contract, the tenant's rights remained relatively limited. In general, he (or she) enjoyed a perpetual lease over the *vakıf* property. He could transfer his use-right with the permission of the trustees, but, under normal circumstances, he could not pledge it, and he could leave it only to his immediate children. If he lacked children, his right reverted to the *vakıf*. In both the *mukataa* and the *icareteyn* arrangements, the tenant was responsible for the maintenance of the *vakıf* property. He was also expected to make up the difference between the annual rent and the going 'fair rent' on the basic property, that is without taking into consideration the appreciation of the property due to the contract-holder's repairs and/or additions. If he did not pay this fair rent, his contract ceased and the proprietor could expel him, but in practice such an action involved a lengthy and costly procedure, particularly in the case of *mukataa* contracts.²¹

Mukataa and, especially, *icareteyn* arrangements became commonplace in Istanbul in the eighteenth century. Similar arrangements were

¹⁹ The following discussion is based on Yazır, *Vakıflar*, at pp. 35–7 and 75–91; B. Köprülü, 'Evvelki Hukukumuzda Vakıf Nevîyetleri' (1951) 17 and (1952) 18 *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası* 685 and 215, respectively; Hatemi, *Tüzel Kişiler*, at pp. 318–79, 646–86, and 744–73; Barnes, *Foundations*, at pp. 54–9 and *passim*; G. Baer, 'Hiqr'; Akgündüz, *Vakıf*, at pp. 354–400.

²⁰ Many women were involved in the *mukataa* and especially *icareteyn* deals.

²¹ B. Köprülü in 'Vakıf Nevîyetleri' underlines the legal and procedural difficulties involved in forcing the holders of *icareteyn* and especially *mukataa* contracts to pay the fair rent (pp. 714–15).

made also between the permanent lessees and sub-lessees of the *vakıfs*, and even between private proprietors and their tenants. Conflicts stemming from these complex arrangements intensified in the latter half of the eighteenth century, concurrently with the intensification of the central government's efforts to tap *vakıf* revenues to finance its desperate wars and military reform efforts. As of the late 1760s, the government began to borrow money internally against the revenue of the larger and government-controlled imperial *vakıfs* supervised by the palace administration. The original idea was to keep the initial proceeds in a special account and to restore the sum to the *vakıfs* in time. Due to continual financial problems, however, this temporary measure became the routine way of diverting the revenue of a growing number of *vakıfs* to special accounts set up to finance military reform. Meanwhile, the government encouraged the building of new *vakıfs* and took steps to increase the revenue of the existing ones in order to service the interest on outstanding loans and to generate additional income. These steps included the leasing of *vakıf* property to the highest bidders of a down payment.²² *İcareteyn* contracts were preferred, because the limitations they set on the transfer of the property allowed the *vakıf* to collect a fee on each transaction and facilitated the reversion of the property to the *vakıf* when the contract-holder lacked heirs other than his immediate children. These contractors were called *mutasarrıfs* ('possessors') and occasionally 'proprietors', because they were entitled to perpetual use-right over the *vakıf* property.

In an effort to make profits on their investment, the *mutasarrıfs* demanded higher rents from the artisans and traders or else the evacuation of shops. The *vakıfs* and the government, too, stood to gain from an increase in rents, because that would have facilitated the auctioning of *vakıf* revenue at higher down payments and encouraged more of the people with sufficient financial means to undertake the reconstruction of dilapidated *vakıf* property or simply to manage it and collect the due rents. However, the artisans and traders resisted the payment of higher rents.²³

²² Cezar, *Bunalım*, esp. at pp. 79–88, 98–111, 128–34, and Hatemi, *Tüzel Kişiler*, at pp. 330–38.

²³ This point and the following discussion are based on three important decrees that evaluate the development of the *gedik* issue in 1805 (quoted in Nuri, *Mecelle*, vol. I, pp. 654–5), in 1814 (in EEA pp. 187–9), and in 1860 (in Nuri, *Mecelle*, vol. I, pp. 663–4); two documents that include a set of questions directed by Selim III to

Artisans argued that they were no ordinary tenants. They linked their arguments to custom, Islamic law, and the logic of public benefit, the realm of sultanic authority *par excellence*. Typically, they emphasised that the shops in which they worked had been reserved for their trade by long custom and that custom had to be honoured. Furthermore, they argued that their productive activities added to the value of the *vakıf* property. More important, their implements and other tangible investments (that is their *gediks*) in a shop constituted a fixed component of that shop, thus adding to its value. As *gedik* owners, they had kept the premises in good order; they had repaired and overhauled them out of their own pockets, thus contributing to the upkeep of the property in a way beneficial to the proprietors (*vakıfs*, essentially). They had neglected neither the regular payment of their customary rents nor the prompt fulfilment of their fiscal and other obligations to the government. In other words, the artisans claimed that they were entitled to the legally recognised right of fixed tenure (*hakk-ı karar*) no less than the *mutasarrıfs*. In addition, the artisans argued that if they were expelled from their shops or were obliged to pay higher rents, this would disrupt not only their own livelihood but also harm other people. Merchants would run into difficulty in collecting their money and thus feel reluctant to supply merchandise. Shortages and price increases would ensue and harm the populace at large (*ibadullah*) as well as the government revenue and interests.²⁴

The implications of these arguments within the Ottoman legal tradition call for elaboration. Appeal to custom alone would be a weak argument against the fair rent demands of those who had acquired a perpetual use-right on *vakıf* property by means of legally recognised and government-backed contracts. However, if recognised as valid, the artisans' claims that their *gediks* constituted a fixed part of the rented premises and that their investments and activities added to the value

the *divan* about the validation of *gediks* in 1791 (CB 1105) and 1801 (CB 1000); and a reading of actual cases of rent disputes brought to the *divan*. For the cases, see EEA p. 282 (1759); CB 7598 (1777); EEA pp. 218–20 (1877–1903); EEA pp. 263–5 (1762–78); CB 1387 (1795); CB 7598, 11th doc. (1779); CB 7598, 2nd doc. (1800); EEA pp. 222–25 (1801); EEA pp. 94–99 (1804–39); EEA pp. 181–4 (1806–14); CB 735 (1805–07); CB 7597, 16th doc. (1781–1809); EEA pp. 203–5 (1810), and CB 7598, 3rd doc. (1811). All these cases reflect the situation before Mahmud II's reign (1809–39), which witnessed a new policy in handling the *gedik* issue, as will be seen below.

²⁴ See the documents mentioned in the previous note.

of these premises would provide the artisans with a use-right comparable to that of a *mukataa* contract-holder.²⁵

Back in the sixteenth century, several prominent Ottoman jurists had recognised that an artisan would be entitled to a right of perpetual tenure (*hakk-ı karar*) on rented property under certain circumstances. According to these jurists, if a tenant added fixtures that were necessary to practise his trade to the rented shop with the explicit permission of its proprietor, then the tenant should be entitled to a perpetual lease. Since the installations were the tenant's property, he could sell, rent, pledge, endow, and donate them and transfer them to his legitimate heirs so long as the fair rent of the original property was regularly paid to the proprietor. Appreciation of the property because of the tenant's additions to it should not raise the fair rent, but the overall appreciation of the buildings in the same location should. Similar practices on agricultural land were commonplace and entailed a legally recognised right to perpetual or permanent tenure (*hakk-ı karar*). The jurists had these parallel practices in mind when they opined that an artisan's fixed contributions to a property should likewise entitle him to a similarly conditional fixed or permanent tenure. They used the word *sükna*, 'residence', to express this particular entitlement, apparently, not only because *sükna* was the customary word used then but also to differentiate *sükna* from similar practices that entailed similar rights. Arguably, the use of several different words for rights that rested on the same basic legal concept of 'fixed tenure' (*hakk-ı karar*) marks the reluctance of the jurists to raise local customary practices to the level of a general rule, especially when the rule would compromise the unanimously upheld doctrinal principles governing the *vakıfs*. Many jurists opined against this tendency.²⁶

²⁵ The analogy between a fixed *gedik* and *mukataa* was explicitly mentioned in the 1913 (22 Ra 1331) law on *gediks* in *Düstur* (2nd series, Matbaa-i Amire, Istanbul, 1911–27), vol. V, p. 118, Art. 7. Also, Hatemi, *Tüzel Kişiler*, at p. 354.

²⁶ This discussion on the *sükna* is based on a reading of my sources in the light of the accounts of Yazır, *Vakıflar*, at pp. 85–7 and Akgündüz, *Vakıf*, at pp. 401–12. *Sükna* was related to the older concept of *khilu*, which had broader applications. See A. Karim Rafeq, 'The Impact of Europe on a Traditional Economy: The Case of Damascus, 1840–1870' in J.L. Bacque-Grammont and P. Dumont (eds.), *Économie et sociétés dans l'Empire Ottoman* (CURS, Paris, 1983), p. 428. Clearly, the concept of *gedik* had many precedents, all of which implied long-term or perpetual tenure. Equally clearly, however, *gedik* had connotations peculiar to the period in which it prevailed.

Yet, the issue resurfaced in the latter half of the eighteenth century. The eighteenth-century artisans' protest that they were tenants with the right of perpetual tenure on their work premises is reminiscent of *sükna*. Indeed, some documents used the derivative word of *sakin*, 'resident', in referring to artisans with respect to their relationship with the *vakıfs*. Furthermore, the kadis recognised that, in principle, the installations (that is *gedik* in its original and narrow sense) of an artisan entitled him to perpetual tenure if these installations constituted a fixed (*müstakır*) part of the shop and were placed in it with the explicit permission of the proprietor or the trustee of the *vakıf*. Some artisans were able to provide the necessary evidence and obtain a regular court decision that approved their *gediks* as 'fixed' (*müstakır*).

Such a decision strengthened the hand of artisans in their rent disputes with the *mutasarrıfs*, who had acquired similar use-rights over *vakıf* properties by way of a recent *icareteyn* contract or a similar arrangement. In some of these cases, the masters, trustees, and the *mutasarrıfs* reached a negotiated settlement, which normally involved a modest rent increase and the unequivocal recognition of the fixed status of the masters' tenancy. The *mutasarrıfs* of several newly built or recently renovated large *vakıf* properties themselves took the initiative to grant permanent tenure to their tenants in an effort to avoid prolonged rent disputes or merely to find reliable tenants. In these cases, the *mutasarrıfs* usually constituted a partnership, and the tenants either existed as a group or formed themselves into a group, as the residents of the building in question. In other words, the agreements reached thereby were between collective legal *personae*. In general, these agreements specified the rents, held the tenants collectively responsible for the prompt payment of rents in return for being assured of permanent tenancy at fixed rents and for the right to decide who could rent the shops under their responsibility.²⁷

The kadis were authorised to arbitrate these agreements. However, the kadis presented the agreements to the *divan* for final endorsement or they encouraged the involved parties to do so. Arguably, the kadis felt that the tripartite agreements between the *vakıf* trustees, lessees, and sub-lessees were not open-and-shut cases that could be decided within the explicit bounds of Islamic law. In fact, the overwhelming majority of

²⁷ See CB 1063 (1794, 1769); CB 7598, 12th doc. (1804); CB 7598, 15th doc. (1802, 1803); CB 7396 (1801); CB 787 (1761–62, 1782); CB 1925 (1755, 1766) and CB 492 (1766).

rent dispute cases clearly fell outside the regular jurisdiction of the kadi courts. In these cases, the artisans and traders could not produce sufficiently compelling evidence to back their claims to fixed tenure. Some of these artisans and traders, however, were able to point to imperial decrees that underlined the need for them to stay at fixed addresses for the sake of public benefit. A case in point concerns the groups that had already reached an agreement with the wholesale merchants and the government to be collectively responsible for their fiscal obligations, as mentioned above. These groups produced the imperial decrees issued to them in the past as evidence to avert the *vakıf* trustees, contract-holders (*mutasarrıfs*), or other proprietors' threats of rent increase or evacuation. The courts checked the documents against government records to establish their validity. If valid, the *gediks* of the group in question were also accepted to be 'valid' (*muteber*) and therefore 'fixed' (*müstakır*),²⁸ legally equating them with property held by a *mukataa* contract, although these *gediks* did not necessarily constitute genuinely fixed appendages of the shops in which they existed.

Other artisans and traders who faced demands of rent increase could only appeal to custom and precedent. They claimed that by long custom of the marketplace they practised their trade in specific places and, therefore, they ought to be treated as fixed *gedik*-holders.²⁹ These artisans and traders began to apply to the regular courts for the endorsement of the *gedik* certificates issued to them by their stewards, hoping that the endorsement would protect them against demands for rent increase or for the evacuation of the shops. The regular courts recognised the certificates as documents of mastership and ownership of implements but usually rejected their validity as claims to shop space, unless corroborated by evidence of the proprietors' consent or governmental authorisation.³⁰

As the pressure of the proprietors intensified on them, the artisans and traders felt a need to strengthen their position. There were efforts to pass false testimony or improper government papers as evidence, not without the connivance of court officials. Indeed, there is reason to believe that the artisans and traders were resolved to have it their

²⁸ See, e.g., the tobacconists EEA pp. 263–5 (1778 and 1762); ironers CB 7598, 11th doc. (1779); the makers of amber products EEA pp. 181–4 (1806, 1814); wine shops CB 735 (1805, 1807) and grommet makers CB 7598, 16th doc. (1781–1809).

²⁹ This point becomes especially clear in the imperial decree of 1814 (in EEA pp. 187–9), which evaluates the development of the *gedik* issue in retrospect.

³⁰ See the decree of 1814 (in EEA pp. 187–9); CB 1396 (1801), and CB 1000 (1801).

own way, much as they might have respected the high principles of the Islamic legal tradition.³¹ In general, however, it was clear that the regular courts would not let claims based on custom alone prevail over claims that stemmed from a proper *mukataa* or *icareteyn* contract, let alone the interests of a *vakıf*. Noting the difference that sultanic decrees and being registered in government books made in the courts, many groups of artisans and traders rushed to the *divan* for a final settlement of their claims to shop space. The artisans and traders acted in groups, sometimes forming groups anew or reactivating a scattered or defunct group. The groups appealed to previous *divan* decisions related to their trade in one way or another and asked for the clarification and reinforcement of these decrees with the clear intention to get their *gediks* recognised as fixed. Each group had arguments of its own. Invariably, however, the applicants appealed to the government's responsibility to preserve public benefit (*naḥ'an lil-ibad*), along the lines already summarised above.

The artisans and traders' pleas intensified during the reign of Selim III (1789–1807), along with the issuance of new *icareteyn* deals and a new wave of inflation.³² Cases of rent disputes flooded the Ottoman judicial system, the judges had their hands full trying to sort out the different *gedik* papers, and other documents presented to the courts in support of a case.³³ Selim III became personally involved in the issue. He wanted the market forces to play a freer and greater role in the settlement of rent disputes. He decreed that the artisans and traders should not be allowed to acquire fixed tenure rights without good reasons and at the expense of legitimate proprietors. Yet, artisans' persistence obliged the Sultan to reconsider his position. He ordered an examination of their demands and old records in order to develop some criteria that would help apply the public benefit principle consistently and to balance the interests of the proprietors and the *esnaf*. Based on the information supplied to him, he acknowledged the need for certain groups of artisans and traders to work in fixed addresses for reasons of public benefit. Groups dealing in necessities and provisions such as bakers, butchers, grocers, candle makers, water carriers, and the like were in this category. Likewise, the membership and activities of certain groups had to be kept under close

³¹ See the decrees of 1805 (in Nuri, *Mecelle*, vol. I, pp. 654–5) and of 1814 (in EEA pp. 187–9).

³² On inflation, see Shaw, *Between Old and New*, at pp. 178, 446 n. 43.

³³ EEA p. 188 (1814).

scrutiny in order to assure public trust or to avoid hazards. This category included groups working in the transportation sector, such as boatmen and carriage drivers, and groups engaged in hazardous activities, such as bakers and bagel and pie-makers, firewood and charcoal dealers.³⁴

The groups in these lines of activity had little difficulty in obtaining decrees (or getting the decrees they already held revised and renewed) along the lines they desired. These decrees recognised the claims of the related group to fixed (*müstakır*) implements as valid (*muteber*) and often explicitly forbade rent increases beyond established rates. In addition, the decrees incorporated each group's 'custom', usually as it pertained to the transfer of *gediks*, promotion to mastership, and relations with the proprietors, merchants, and government. As such, each decree defined the relevant group's rights and obligations and was appropriately called its *nizam*, with the connotation of a 'charter' at this point.³⁵

The recognition of some of the *gediks* as valid and fixed (whether by obtaining a charter or other judicial means) led to the emergence of a legal distinction between 'fixed' (*müstakır*) and 'aerial' (*havai*) or 'unfixed' *gediks*. In general terms, the latter represented nothing more than a permit or right to practise a certain trade independently and the proprietorship of a corresponding set of moveable tools and equipment. As stated in a decree of Selim III, an 'aerial' *gedik* owner should pick up his *gedik* and practise his trade elsewhere, if the shop had to be restored to those who had a legitimate use-right over the property in question.³⁶ In practice, however, the 'aerial' masters presumed equal rights with their 'fixed' colleagues and could think of many reasons why their line of activity was as relevant to public security, trust, or benefit. An increasing number of artisans and traders organised themselves in groups and applied to the courts requesting the recognition of their *gediks* as valid. It became virtually impossible for the courts or the Sultan himself to maintain the criteria set to determine the fixed status of a *gedik*. Indeed, even artisans whose *gediks* (tools) were obviously not of a fixed nature (including some vendors) now claimed permanent residency based on custom.³⁷

In 1805, Selim III moaned that the *gedik* issue had become an unpleasant phenomenon, because the *gedik* owners, contrary to legal

³⁴ CB 1105 (1791).

³⁵ See the cases included in Kal'a *et al.* (eds.), *Ahkam Defterleri*, vol. II.

³⁶ Selim III's 1805 decree quoted in Nuri, *Mecelle*, vol. I, p. 655.

³⁷ See the imperial decree of 1814 in EEA pp. 187–9, for these developments.

tradition, insisted on possessing real property without the consent of the proprietor and hence were like usurpers (*gasıb*). This situation prevailed even in trades where there could be no legal justification whatsoever for a fixed *gedik*. However, the phenomenon had become so widespread in Istanbul, its environs, and some other towns that it constituted a ‘generalized dire necessity’ (*umum-i belva*), distressful though it might have been for other interested parties. The Sultan’s words reflect the opinion of his legal advisers, for they evoke a legal principle that recommends the toleration of a normally reprehensible practice if it stems from a dire necessity that had spread among the population at large or among a significant segment of it. All the same, the Sultan wanted this phenomenon to be brought under control because it also incited monopolistic practices.³⁸

GEDİK AS SHARE IN MONOPOLY

The better organised the groups became,³⁹ the more effectively they were able to resist the opening of new shops in their line of economic activity. This situation fanned inflationary pressures, although the need to curb inflation was one of the main arguments on which the groups relied in requesting from the *divan* the freezing of the rents for the sake of the public’s benefit.

When a reasonably well-organised group managed to obtain through the *divan* a decree in the nature of a charter that recognised the *gediks* of the masters in the group as fixed, the masters tended to interpret their rights therein as exclusive of other people, including their own senior assistants. Since the charter was essentially a legal contract among the master artisans, on the one hand, and among the group as a legal *persona* and the government, on the other, it listed the undersigning master artisans and their locations. The masters on the list, or their successors at the same location, tended to consider the list as fixed as

³⁸ Nuri, *Mecelle*, vol. I, pp. 654–6. Also, see the imperial decree of 1814 (in EEA pp. 187–9). On the concept of *umum-i belva* (general distressful necessity) and the broader principles that govern it, see Akgündüz, *Vakıf*, at p. 411, and Mustafa Baktır, *İslam Hukukunda Zaruret Hali* (Akçağ, Ankara, [1982]), pp. 190–1.

³⁹ The conditions during the period covered encouraged the artisans and traders to organise in groups or to strengthen their existing groups in pursuit of their interests. Quite a few of the groups discussed in previous notes formed anew or even from scratch. This tendency became much more manifest during 1808–38 for reasons to be discussed below.

their implements. Their attitude caused considerable confusion for the courts, especially in the case of conflicts between the master artisans and the senior apprentices of the same group. Many judges held that unless the charter of a group froze the number of the sets of implements (or shops) in its line of work, the group could not claim a monopolistic privilege. The charters typically left evaluation of competence, promotions, and the transfer of *gediks* to the discretion of the established masters – to be exercised in accordance with the custom of the group. However, the masters were not supposed to use this discretion to prevent their qualified senior apprentices (or other qualified people for that matter) from establishing an independent shop. A number of court cases and imperial decrees testify to the point.⁴⁰ Nevertheless, many groups applied to courts to prevent any attempts to increase the number of *gediks* in their trade.

Selim III wanted to arrest this trend just as outspokenly as he upheld the rights of proprietors against the encroachment of *gedik*-owners. Indeed, one of the chief reasons for the Sultan's opposition to *gediks* was the tendency of the *gedik* owners to assume *de facto* monopolistic privileges. According to the Sultan, a monopolistic privilege could be justified only in the case of dealers in basic necessities (such as bread, meat, candles, and tallow) in order to assure their steady supply to the populace at well-established spots. He held, correctly so from a pure legalistic (*shar'i*) point of view, that otherwise the fixation of the number of *gediks* by an act of the courts would be unlawful. He ordered the revision of the existing decrees that governed the affairs of the *esnaf* in order to prevent unlawful claims to monopoly. He asked the judges to exercise utmost caution in granting fixed status to the *gediks* of a group, lest the group abused the privilege to monopolise a trade. Finally, he ordered the government officials not to honour monopolistic claims. As already indicated above, however, the artisans and traders had their way. Selim had to repeat his orders in several decrees, and on one occasion,

⁴⁰ Compare the cases settled in favour of the senior assistants (EEA pp. 285–6; EEA pp. 222–5 (1761) and CB 7598, 2nd document (1800 and 1779)) with cases settled in favour of the masters (EEA pp. 249–51 (1795 and 1775); CB 524 (1763), and EEA pp. 35–6 (1832)) and cases where a compromise solution was reached (CB 7598, 5th doc. (1821); CB 480 (1759); CB 44 (1766); CB 411 (1796); CB 381 (1803); CB 15 (1809 and 1808); CB 43 (1813 and 1811), and CB 5534 (1819 and 1789)). Clearly, the guiding legal principle was that a deserving *kalfa* (senior apprentice) could not be prevented from setting up his business, unless an imperial decree explicitly limited the number of shops in a specific trade or at a specific part of the marketplace.

he reprimanded his officials for paying no heed to his orders.⁴¹ His reprimands bore little weight. Instead, he himself was deposed in 1807, in a popular uprising in which the artisans and shopkeepers of Istanbul evidently played a role.⁴²

Mahmud II (1808–1839), Selim's successor after a brief interval, was conciliatory toward the artisans and traders. An imperial decree issued early in his career (1814) indicates that some of his advisers had cautioned him against the legal complications generated by the peculiar development of the *gedik* issue and its inflationary effects on commodity prices.⁴³ An overall examination of the court decisions of his reign,⁴⁴ however, makes it clear that during this period master artisans and traders gained full control over the shops they occupied based on their government-ratified *gedik*-papers. Moreover, almost every sufficiently well-organised group obtained from the government the monopoly of its trade. Indeed, it was through Mahmud II's reign that the concept of *gedik* became definitively established as the usufruct of a work place equipped and reserved for the exclusive practice of a specific trade group. Financial considerations affected this outcome as much as the capacity of the organised artisans and traders to fan political tension in the capital.⁴⁵

Mahmud II established a *vakıf* of his own in 1809 and accelerated the efforts to consolidate the administration of major *vakıfs* with the clear intention to control the leasing and the sub-leasing of *vakıf* property as

⁴¹ See the imperial decrees of 1789, 1795 and 1805 quoted in Nuri, *Mecelle*, vol. I, pp. 647–8, and 654–6, and the following decisions: EEA pp. 252 (1789), 246 (1794), 237–9 (1790–96), 228–30 (1794–96), 222 (1785, 1801), 220–2 (1805), 218–20 (1762, 1777, 1803), and 222–5 (1801), and CB 186 (1791–92, 1800).

⁴² For the artisans and traders' capacity to fan or quell political tension in Istanbul see M. Aktepe, *Patrona İsyânı* (İstanbul Üniversitesi Edebiyat Fakültesi Yayınları, İstanbul, 1958); R.W. Olson, 'The *Esnaf* and the Patrona Rebellion of 1730' and 'Jews, Janissaries, *Esnaf* and Revolt of 1740' (1974) 17 and (1977) 20 *Journal of the Economic and Social History of the Orient* 329 and 185, respectively. Also see C. Kafadar, 'Janissary-Artisan Relations: Solidarity and Conflict' MA thesis (McGill University, Islamic Studies, 1981). However, the artisans' precise role in Selim's dethronement and then killing remains to be established.

⁴³ EEA pp. 187–9 (1814).

⁴⁴ EEA pp. 22–44, 65–90, 110–211; Sıdkı, *Gedikler* (İstanbul, [1909/10]), pp. 24–30; CB 7598, 525, and various documents mentioned in the following notes.

⁴⁵ The artisans and traders helped the government quell and abolish the Janissaries in 1826. See Kafadar, 'Janissary-Artisan Relations' and Ahmed Lutfi, *Tarih-i Lutfi* (Matbaa-i Amire, İstanbul, 1289–1328 [1872–1910]), vols. 1–2 ([1872–74]).

a source of indirect revenue for the government's reform projects. By this time, however, *esnaf* resistance had effectively killed all interest in investing in *vakıf* property, unless the investors were able and willing to incorporate the tenants in their schemes.⁴⁶ In order to develop new ways to exploit this source of revenue, the government turned its attention to artisans and traders themselves as potential purchasers of perpetual leases, first in a rather roundabout way and later methodically.

First, every effort was made to observe and control closely the transaction and transfer of valuable *gediks* so that they could be turned into government property when fallen vacant, assigned to Mahmud's *vakıf*, and then leased to an interested party on an *icareteyn* contract. Since the fixed *gediks* were treated as private property from a legal point of view (as in the case of the investments of a *mukataa* contract-holder), they had to accrue to the public treasury when the owner died heirless. However, Mahmud's *vakıf* preferred an *icareteyn* contract, because, to repeat, the limitations it imposed on inheritance rights speeded up the reversion of the leased property to the *vakıf* in the absence of proper heirs (namely, the immediate children of the deceased). Established groups objected to this policy on two grounds. The policy threatened a group's right to control the distribution of its *gediks*. Furthermore, the artisans opposed *icareteyn* in principle, because a property possessed under such a contract could not be pledged legally and it had little value as a security for credit.⁴⁷ The government assured the groups that their established rights would be respected and agreed to include a special clause to allow the pledging of *gediks* as security for credit in *icareteyn* contracts that involved artisans. The Sultan's prerogative to have the final word on matters that pertained to public interest (*maslahat*) justified this intervention in legal conventions. The government intensified its efforts to control *gedik* transactions more effectively. In addition, it encouraged artisans to move to new sites and buildings that were created as revenue sources for the consolidated imperial *vakıfs*,

⁴⁶ These schemes necessitated the clearance of the registration of the shops as shops that contained officially recognised fixed *gediks*. For three detailed cases see, CB 7598, 6th doc. (1828); CB 7396 (1801), and EEA pp. 156–7 (1826).

⁴⁷ For government efforts to seize vacant *gediks* and the ensuing developments see EEA pp. 173–4 (1809–13). For the long-term consequences of this decision and some of the legal complications involved in these situations, see EEA pp. 54–9 (1801–46), and EEA pp. 47–50 (1851–53). For artisans' dislike of *icareteyn* contracts, see, especially, CB 7598, 12th doc. (1804); CB 1000 (1764, 1801); and CB 1064 (1769, 1794).

including Mahmud II's *vakıf*. In the process, a growing number of artisans were brought under an *icareteyn* contract. These arrangements had precedents dating back to the 1750s and disturbed the privileges of the established groups relatively little. However, a sense of urgency and occasional resort to threats distinguished Mahmud II's *esnaf* and *vakıf* policy.⁴⁸

Mahmud II's policies acquired clarity and vigour over the years. He further consolidated the large *vakıfs* and brought them under a single administrative department in 1826.⁴⁹ Simultaneously, he levied a new tax on artisans and traders and established a new bureau to control and regulate the marketplace. The artisans organised demonstrations and resisted the tax. Mahmud was obliged to reduce the tax rates, but he did not compromise the new bureaucratic system that he was building, which gradually marginalised the crucial role played by the judicial courts in reconciling and regulating the networks of the marketplace.⁵⁰ Partly to make up for the lower than expected yields of the new tax and partly to facilitate its collection, Mahmud embarked upon a systematic drive to turn *gedik* ownership into *icareteyn* tenancy in 1831. In a decree issued that year, he ordered all the artisans and traders in Istanbul

⁴⁸ See CB 1000 (1764), CB 510 (1768), CB 787 (1761–62, 1782–87), and Cİ 2176 (1762) for earlier examples of the registration of artisans' 'assets' as fixed *gediks*, mostly on a *mukataa* contract that granted certain monopolistic advantages to the tenants. The *vakıfs* spent the revenue thus raised on the reconstruction of new business quarters, aqueducts, and mosques. Under Mahmud II, however, the executive branch of the government was directly involved in the implementation of the *vakıf* policy, spent the revenue on military organisation, and did not always respect the sanctity or autonomy of the *vakıfs*. For arrangements enforced by Mahmud II's personal intervention early in his reign, see EEA pp. 205–98 (1810) and pp. 184–7 (1812–14). Also see EEA pp. 162–4 (1816): the case of 43 wine shops that had been attached to one of the consolidated *vakıfs*, apparently under the personal responsibility of the Sultan. Attaching wine shops to a *vakıf*, a religious institution, is a particularly interesting situation.

⁴⁹ For a general evaluation of the *vakıfs* under Mahmud II, see Yazır, *Vakıflar*, at pp. 37 and 187–91; Hatemi, *Tüzel Kişiler*, at pp. 330–40; Barnes, *Foundations*, at pp. 87–117; M. Nuri, *Netayic ül-Vukuat* (N. Çağatay (ed.), *Türk Tarih Kurumu Yayınları*, Ankara, 1979–80), vol. IV, pp. 99–101. Barnes praises Mahmud for incorporating the *vakıfs* into the modern centralised governmental apparatus that he was trying to build. The other authors admit the need for reform but criticise the Sultan in varying degrees for destroying the autonomy of the *vakıfs*, compromising their objectives, and ultimately breaching the spirit of the law that governed them.

⁵⁰ For these developments see Nuri, *Mecelle*, vol. I, pp. 335–92; Lutfi, *Tarih*, I, at p. 241 *et seq.*, Cezar, *Bunalım*, at pp. 250–2, and Ahmet Kal'a, *Esnaf Birlikleri*, at pp. 137–54.

to ‘donate their *gediks*’ to one of the designated *vakıfs* and then ‘to rent them back on *icareteyn* contracts’.⁵¹ An examination of the related cases at hand shed light on the nature of this development.⁵²

The actual contract was between an individual master and a *vakıf*, in accordance with Islamic law, but its exact terms were determined by ‘the custom of the group’, as legitimised by sultanic authority in the form of a ‘charter’ (*nizam*). The master would enjoy a perpetual lease on the *gedik* (and therefore on the space of a specific shop) at a fixed rent, and the right to transfer (*intikal*) it to his children, but only to his children. If none of a deceased or retired master’s children qualified to become a master in the trade, then the other masters would auction off his *gedik* to a qualified person as they saw fit and would deliver the proceeds to his children. If the deceased did not have proper heirs, the *gedik* would revert to the *vakıf*. It would be auctioned likewise to a person approved by the masters, but now all the proceeds would accrue to the *vakıf*. Not unsurprisingly, the contract allowed the holder to pledge the *gedik* as security for credit, particularly to assure the merchants and to secure the contract-holder’s fiscal obligations to the government. In case of insolvency, the group would again auction the *gedik* to a qualified person, but the proceeds would be used primarily to pay the debt, including the tax arrears. Some contracts held the masters collectively responsible for making up the difference between the debt and the sale value of the pledged *gedik*, or, really, its usufruct, for legally speaking, the *vakıf* owned the substance (*raqaba*) of the *gedik* according to these contracts.

The *vakıf* collected the periodic modest rent it received from the user of the *gedik* as well as a transfer fee each time the *gedik* changed hands. Normally, the masters were not expected to make a down payment but simply to ‘donate’ their *gediks* to the designated *vakıf* to initiate the contract.⁵³ Irrespective of the identity of the original owner of the building, the *gediks* were attached to specific *vakıfs*, usually those that had been endowed by Mahmud II or Selim III to help finance military

⁵¹ The quotation is from EEA pp. 86–9 (1837), at p. 87. Also, EEA esp. pp. 150–3 (1831, 1827–28); Akgündüz, *Vakıflar*, at p. 416, n. 61, and Sıdkı, *Gedikler*, at pp. 25–30,

⁵² See in EEA pp. 150–3 (1827–31); pp. 69–71 (1833); pp. 77–9 (1836); pp. 106–10 (1837); pp. 3–13 (1837); pp. 86–8 (1837); pp. 91–3 (1838); pp. 101–4 (1839); pp. 94–9 (1839); pp. 104–6 (1840); pp. 110–11 (1840), and pp. 49–50 (1853), in addition to CB 1614 (1832); CB 1236 (1836), and Sıdkı, *Gedikler*, at pp. 24–30.

⁵³ EEA pp. 106–10 (1837).

reforms. This situation further complicated the picture by adding yet another layer of entitlement to the property in question. There were also instances of a master ‘donating’ his *gedik* on an individually owned premise to a *vakıf* in return for a privileged *icareteyn* contract, without necessarily acquiring the consent of the proprietor as required by the established legal principles.⁵⁴

To repeat, although the actual contract was between the *vakıf* and the individual master, its terms were determined by the deal between the government and the group. Each deal was an occasion to review or chart anew a group’s *nizam* (hence ‘custom’) for more effective government control in return for monopolistic and various other privileges granted to the group. These privileges were again justified in terms of public interest, but public interest was now interpreted far more broadly than ever in the past. The necessity to secure the delivery of products to military or other government offices; fulfilment of tax obligations; regulation of the distribution of goods from wholesale merchants to a registered, specific group of retailers in order to assure both the steady supply of commodities and the credit extended by merchants; control of the socially sensitive activities of certain artisans, traders and even vendors;⁵⁵ and sometimes simply the preservation of the self-declared ‘custom’ of a group or the existence of a precedent – all these were considered sufficient reason to extend fixed status to *gediks* and to restrict their numbers to boot.

EPILOGUE

As indicated above, the artisans and traders of eighteenth-century Istanbul were involved in a complex web of social networks, relationships, and power struggles in a highly strained political and economic environment. They strove to protect their interests by resorting to several means. Above all, they relied on the legal system, pursuing their causes at the courts willingly and effectively. Since the Ottoman legal system and tradition emphasised the reconciliation of conflicting

⁵⁴ EEA pp. 150–3 (1827–31). Since renting *vakıf* property was vital for the *vakıfs* to serve their designated purpose, the jurists allowed certain compromises that would facilitate the renting of the *vakıf* property. However, a private person had no such obligation to rent his or her property. Consequently, his or her consent was absolutely necessary for any transactions of the tenants that directly affected the status of his or her property. See, e.g., Yazır, *Vakıflar*, at pp. 83–4.

⁵⁵ Such as the boatmen, chariot drivers, tobacconists, and liquor shops.

interests, the artisans were often able to reach negotiated settlements in their differences with other parties. When such a settlement proved unfeasible, they still made use of the legal system to acquire legal protection of their interests. Their undisputed ownership of the implements and other assets of their trade, that is *gediks* in the original sense of the word, became their main legal trump in their efforts to defend themselves against adverse market currents and demands of rent increase. In this regard, they took advantage of the Ottoman legal tradition, which allowed, even encouraged, inclusive, multilayered rights over the same immovable commercial property (whether a building, part of a building, or a ‘fixed’ capital asset), as opposed to moveable commercial goods in which case exclusive ownership was generally the rule.

The artisans concentrated their efforts on having their implements recognised and registered as fixed property, because this would assure them of a perpetual tenure in the shops where they worked. Thus, the artisans would be on a more or less equal legal footing with investors in commercial *wakıf* buildings where the artisans rented their shops. Toward this end, the artisans appealed to all the sources of right recognised by the Ottoman legal system, namely custom, Islamic legal principles, and the sovereign’s discretion in matters that pertained to public interest, which he ought to use with due guidance from senior judges and jurists. In the case of most artisans, however, having their assets recognised as fixed ultimately depended on an interpretation of the public interest in their favour, for these assets were often not fixed substantively.

The Ottoman-Islamic legal tradition posited certain fundamental objectives that meant to serve the absolute minimum needs of human beings and hence constitute the basis of public benefit. These ‘objectives’ and needs applied not only to Muslims but all people who lived under Muslim rule, at least in the Ottoman interpretation of the Hanafi School of law.⁵⁶ Thus, the petitions by artisans and traders as well as other legal documents refer to the benefit of *ibadullah*, that is ‘servants

⁵⁶ Hallaq, *History of Islamic Legal Theories*, at pp. 89–90 and 168–74; Abu Ishaq Ibrahim al-Shatibi, *al-Muwafaqat fi usul al-ahkam* (Matba’at Muhammad ‘Ali Subayh, Cairo, 1970), vol. II, pp. 3–10; Fahri Demir, *İslam Hukukunda Mülkiyet Hakkı ve Servet Dağılımı* (Diyanet İşleri Başkanlığı, Ankara, 1993), pp. 88–9, 144–5, 162–77, and Fahrettin Atar, *Fıkah Usulü* (Marmara Üniversitesi İlahiyat Fakültesi, İstanbul, 1998), pp. 295–6.

of God' in general, within the context of 'public interest' as indicated above. These fundamental objectives can be summarised as protection of life, religion, family life, rightful gain, and the basic means of livelihood to assure rightful gain, and reason, which meant, in the Ottoman context, a reasonably harmonious social order that assured predictability and enabled human beings to live in moderation.

The artisans explicitly referred to these normative objectives in their appeal to public interest. They also put political muscle behind their appeals, however, in order to procure the results they wanted from the legal system. They resorted to force or took advantage of violent political upheavals to impress their demands on people in positions of power. More important, they streamlined their existing groups and formed groups and networks anew, thus pooling their resources together in defending their cases at the courts. Better organisation enabled master artisans to gain firm control over the transactions concerning the assets of each work premise affiliated with their group, in return for joint responsibility for each other's fiscal obligations. Entitlement to assets came to signify not only seniority and competence in a trade, as it had normally done by long custom, but also membership in a trade association with a legal *persona*. A steadily growing number of artisans were able to form such associations, have their assets recognised as fixed and thus expand their entitlement to assets to the space in which the assets stood. When the groups acquired the right to freeze the number of *gediks* in their line of economic activity as well, yet another dimension, the signification of a share in a monopolistic practice, was compressed into the concept of *gedik*. Simultaneously, however, the artisans became vulnerable to governmental supervision, at a time when that supervision was becoming increasingly bureaucratic, hierarchical, effective, and dependent more on administrative fiat than judicial arbitration.

The development of the *gedik* concept and the relations revolving around it took a new turn after 1838, when Mahmud II granted capitulatory legal and commercial privileges to major European states in an effort to win these states' support in his internal wars. Similar treaties that reinforced the privileges of foreign interests and a series of new bureaucratic and legal 'reforms' (*Tanzimat*) aiming at the modernisation of the state apparatus and the legal system widely opened the Ottoman economy to unequal capitalist competition in 1839–71. Under the terms of the capitulatory treaties, the Ottoman government abolished all internal monopolistic privileges, including the ones that had been

granted to artisans and traders in Istanbul.⁵⁷ Most of the groups gradually lost their unity, political leverage and privileges under the influence of the liberal policies pursued by the Western-backed reform cabinets.

Fixed *gedik* ownership, as based on *icareteyn* contracts or other government-acknowledged papers and charters, was not abolished, however. The net effect of the situation was the liberation of the individual *gedik*-owner or holder from his obligations to his group concerning the activities he undertook in his shop space and the transfer of his rights over it. In other words, the individual master's usufruct of the shop space turned into a nearly full personal right, as opposed to being a right subject to the terms of membership in a group and to conditions negotiated with other networks, including the *vakıfs*, the largest of which had been put under the control of a special government office during Mahmud II's reign.

So long as the transfer fee and the nominal periodic rent were promptly paid, the government offices acknowledged the transfer of fixed *gediks*, treating the officially endorsed *gedik* certificates as a deed of sorts. Restrictions on the circulation of *gediks* as a commodity began to fade. Large sums were spent on purchasing a *gedik* and on its renovation and re-equipment for a new business. At first, the existence of multiple entitlements on buildings in which the *gediks* existed (now as shop and work space) and on *gediks* that had been 'donated' to *vakıfs* complicated the sale transactions. Contracts delimiting the transfer, bequeathal, mortgaging, and pledging of some of the *gediks* in favour of a *vakıf* or use-right holder caused additional complications. However, in 1861, the government formally recognised the precedence of the *gedik*-deed holder over the relevant property in view of the magnitude of his (or her) investment in the site of a *gedik*. Succeeding regulations further consolidated the various entitlements on the *gediks* in favour of the deed-holder and eliminated the restrictions on the bequeathal, transfer, and pledging of a *gedik*.

By the end of the Ottoman State, market transactions and administrative regulation had largely unified the multiple rights on *gediks*. *Gedik*-deeds had become almost as good as title deeds, but not quite.

⁵⁷ For the capitulatory treaties and their effects, see Mübahat Küçüköğlu, *Osmanlı-İngiliz İktisadi Münasebetleri* (Türk Kültürünü Araştırma Enstitüsü, Ankara and İstanbul, 1974–76) and E. Akarlı, 'Provincial Power Magnates, 1740–1840' in Abdeljelil Temimi (ed.), *La vie sociale dans les provinces arabes à l'époque ottoman* (CEROMDI, Zaghuan, Tunisia, 1988), pp. 41–56.

The *vakıfs*' nominal ownership of the substance (*raqaba*) of the buildings in which *gediks* existed, or of the lot on which these buildings stood, continued. Islamic legal tradition had become largely marginalised and irrelevant along with the development of capitalist market relations and the adoption of Western-inspired laws and regulations. However, the fundamental principle of the inalienability of *vakıf* property still prevailed; it was deeply shaken but not uprooted. That had to wait for the Republican period, when a law enacted in 1935 obliged the *vakıfs* to relegate their rights to *gedik*-deed holders in return for monetary compensation.⁵⁸ The multiplicity of claims on the same property was at length resolved. Places with the status of *gedik* became 'full property' and the concept of *gedik* a relic of history.

⁵⁸ For developments concerning *gediks* after 1840, see Sıdkı, *Gedikler*, at pp. 42–100; Hatemi, *Tüzel Kişiler*, at pp. 337–8, and 744–73; B. Köprülü, 'Vakıf Nevîyetleri', at pp. 228–52; Nuri, *Mecelle*, vol. I, pp. 662–7, and 714–868; EEA pp. 21–3 and 42–64 (1839–62), and the following documents from the Yıldız collection in the Prime Ministry Archives: YEE 18/553-461/93/37; 31/27-3/27/79; 18/553-280/93/36; 18/553-291/93/36, and 18/553-268/93/36.

CHAPTER SEVEN

LOSING (OUT ON) INTELLECTUAL RESOURCES

Marilyn Strathern

'Living men or women should not be allowed to be dealt with as [a] part of compensation payment under any circumstances.' The custom is 'repugnant to the general principles of humanity'. Thus said Judge Salamo Injia in handing down his verdict on (as it caught the local headlines) the 'Compo girl case'.¹ This was at the Mount Hagen National Court in 1997; it concerned people from the Minj part of the Wahgi region, in the Western Highlands of Papua New Guinea.²

I thank the organisers of the LSE symposium for forcing the pace on 'persons' and 'things'. In Papua New Guinea I am especially grateful for the interest and provocation of John Muke's reflections. Cyndi Banks and Claudia Gross gave unstinting hospitality in Port Moresby in 1995 and 1997, including a visit which the British Academy supported, and supplied me with information about the Minj case.

Parts of this chapter join with other issues in a chapter ('Global and Local Contexts') in Lawrence Kalinoe and James Leach (eds.), *Rationales of Ownership* (UBS Publishers, New Delhi, 2000). Lawrence Kalinoe provided the relevant copy of the PNG Law Reports, and many insights, as did James Leach. Indeed I would not have written this but for the context afforded by the ESRC-funded research project, 'Property, Transactions and Creations: New Economic Forms in the Pacific'; as members of the Trumpington Street Reading Group, several participants commented on the chapter. Eric Hirsch's study, 'Colonial Units and Ritual Units: Historical Transformations of Persons and Horizons in Highland Papua' (1999) 41 *Comparative Studies in Society and History* 805, remains a stimulus. Finally I should mention the 1999 GDAT debate at Manchester on human rights, and Michael O'Hanlon's pertinent observations on the case itself.

¹ [1977] PNGLR 150, at 151.

² Sources include Deborah Gewertz and Frederick Errington, *Emerging Class in Papua New Guinea: the Telling of a Difference* (Cambridge University Press, Cambridge, 1999), a commentary on both the preliminary hearing (June 1996) and the court's

The case offers an interesting comment on the role played by legal technique in the fabrication of persons and things. In some respects it rehearses issues which have long troubled anthropologists describing marriage arrangements. They include the extent to which an equation between women and wealth renders women 'thing'-like, the *locus classicus* being bride-wealth (bride-price) payments, which feeds an epistemological anxiety, the extent to which anthropological analysis in turn treats its subjects as less than subjects, where the *locus classicus* is 'the exchange of women'.³ With these issues in the background, I note the role played in this case by the reference to human rights. That role assisted in the fabrication of persons;⁴ the antithesis between persons and things was never far away.

This is an instance where it might assist analysis to project a distinction of sorts between person and thing onto the Papua New Guinean

determination (February 1997); newspaper reports, e.g. Robert Palme, 'Miriam: Torn Between her Tribe and Herself', *Post Courier* (PNG), 9 May 1996; Sean Dorney, 'The Constitution, Change and Custom: Miriam Wins', *Independent* (PNG), 14 February 1997; and notes from a seminar paper given to the Cambridge Social Anthropology Department in October 1996 by Dr John Muke, who was to provide an affidavit to the court; Cyndi Banks, 'Women, Justice and Custom: The Discourse of "Good Custom" and "Bad Custom" in Papua New Guinea and Canada' (2003) *International Journal of Comparative Sociology* (forthcoming) became available while this chapter was being revised. Miriam is quoted as saying that she found it embarrassing to be referred to as the 'compo girl' (*Post Courier*, 20 February 1997).

³ Either women for women, e.g. through sister exchange, or women for wealth, as when marriages are arranged with bride-wealth payments from the groom's to bride's kin; the transactions could be easily (mis)understood as implying a kind of commodity exchange. Anthropologists predicating their analysis on women exchanged as 'objects', one argument went, ran the risk of rendering them less than subjects in their own accounts. These issues were the focus of debate in the feminist anthropology of the 1970s and 1980s; for one overview, see Renée Hirschon (ed.), *Women and Property, Women as Property* (Croom Helm, London, 1984).

⁴ As Gewertz and Errington, *Emerging Class in Papua New Guinea*, also argue, with rather different intent. They discuss the case for the light it sheds on their thesis that new social differences (they see them as incipient class differences) are springing up in Papua New Guinea. These are based on the estimation of people's worth and life chances which, from the perspective of the middle class professional, drive a wedge between those with and without realistic monetary prospects. Here, they argue, testimony came from a small handful of educated persons who spoke on behalf of others, and who became arbiters and exemplars of 'reasonable' and 'ordinary' behaviour. As to the concept of 'person', it will be seen that I deploy this in the Papua New Guinea context in a manner somewhat analogous to the legal understanding of person: an entity elicited by relationships and thus by procedures which enact them (e.g. exchange transactions).

material, although the techniques of fabrication will be of a politico-ritual rather legal nature, and the distinction does not work quite as Euro-Americans might expect. It will at least allow comparison between the reference to human rights and certain Papua New Guinean formulations. The vernacular⁵ I evoke here is common to ways of thinking and acting found in many parts of the country, including Minj.⁶ Rendering this material as like – rather than unlike – the kinds of Euro-American assumptions which lie behind human rights language serves to highlight a significant resource. This is an intellectual resource: modes of thinking which help us think. It would be a pity to lose possible ways of thinking about the manner in which people make claims on others simply because vernaculars seem local and strange.

THE TERMS OF AN AGREEMENT

A compensation payment for a man's death was agreed between clans from two Minj tribal groups, Tangilka and Konumbuka.⁷ Muke belonged to the same Tangilka patriclan as the dead man, Willingal, and was later called on to give evidence. Willingal had been killed by police; he was said to have been the bodyguard of a wanted man, a fact disputed by his kin. The final settlement comprised 24 pigs, K20,000 money, and a woman who was to be sent to the aggrieved clan in marriage.⁸ The aggrieved in this case were not the clan of the dead man (from Tangilka) – on the contrary, it is they who were being asked for compensation; the demands came from his mother's clan in Konumbuka. The rationale was that the deceased's patriclan had not protected their 'child' (sister's child) properly. This had two components, a particular accusation that they had been indirectly responsible by causing the police to come onto their land, and the more general point that

⁵ A clumsy term, but I do not wish to evoke 'tradition', since we shall see that concept has already been pre-empted.

⁶ My understanding of Minj in the South Wahgi comes from the work of John Muke and Marie Reay, supplemented both by that of Michael O'Hanlon in North Wahgi (Banz) and by certain extrapolations from what I know of their neighbours in Mount Hagen.

⁷ A similar version is given in Marilyn Strathern, 'Global and Local Contexts'.

⁸ At that time the Papua New Guinea kina was worth approx £0.50. For simplicity I use the tribal names for these patrilineal groupings, although the relevant units of action were clans or sub-clans from within the tribes (Tangilka Kumu Kanem and Konombuka Tau Kanem).

they had failed in their care of him. It was a loss to both sets of kin, each of whom had a duty of care which, although carried out in different ways, they owed the other. The two sides came to an agreement and a daughter of Willingal, Miriam, emerged as the obvious bride for the Konumbuka.

The settlement would have gone ahead but for a legal intervention. A human rights NGO based in Port Moresby, Individual and Community Rights Advocacy Forum (ICRAF), 'sought a series of orders from the court to enforce Miriam's constitutional rights'.⁹ Gewertz and Errington¹⁰ sum up ICRAF's grounds: 'regardless of local custom, trading in women could not be allowed because it was violation of fundamental human rights'. As reported in the national press,¹¹ Judge Injia ordered the two 'tribes' to refrain from enforcing their custom. He commented on the sometimes too-hasty evaluation of customs on the part of external agencies, including modern courts, but observed that the issue was a constitutional one in another sense, involving the precedence of national law over customary practices. It is Gewertz and Errington's view¹² that the judge was quite self-conscious about the role played by the professional 'middle class' in promoting the 'reasonableness' of modern morality.

Modern morality and its entailments provided the terms of a lively debate which we have, remarkably, on record. This was a conversation which took place at the Mount Hagen Lodge hotel on the eve of the preliminary court hearing the year before.¹³ Apart from the two anthropologists, the others were professional Papua New Guineans: the lawyer employed by ICRAF to argue for Miriam's protective custody, and the priest into whose care the lawyer hoped she would be placed, as well as the hotel proprietor, who had her own strong views, and her nephew. The conversation turned on the kind of person modern Papua New

⁹ The PNG Constitution provides for the recognition of customary law (it can be argued in court as relevant fact) to the extent that it does not conflict with constitutional law, which includes the promulgation of several rights, or is not repugnant to the general principles of humanity. When the story had been first exposed by the *Post Courier* (3–5, 9 May 1996), and before ICRAF had laid their complaint, Judge Injia had initiated enquiries on the grounds that the National Court has the jurisdiction itself to bring an action for the enforcement of constitutional/human rights.

¹⁰ Gewertz and Errington, *Emerging Class in Papua New Guinea*, at p. 125.

¹¹ e.g. *Post Courier*, 11 February 1997; *National*, 12 February 1997.

¹² Gewertz and Errington, *Emerging Class in Papua New Guinea*, at p. 133.

¹³ *Ibid.* at p. 123.

Guineans should be. Above all these were imagined as agents, as subjects, as individuals who could and should exercise choice.

The small party was divided over the question of what kind of person was appropriately bound by what sort of standard – standards ‘based on ancestral precedent or on a more universalistic vision of human rights’.¹⁴ The lawyer and priest conceded that many customs were ‘good’ but deplored ‘bad’ customs which went against human rights and, in the priest’s view, against Christian teaching; the proprietor and her nephew thought that such compensation payments were for the general good of the community, and helped keep the peace.¹⁵ The conversation included a discussion of bride-wealth, which the proprietor defended as cementing matches that brought benefits to clans, while her nephew observed that with money as the medium of exchange women became like commodities.¹⁶ All of them took the modernist view that one could choose between customs, so that rational evaluation by the ‘educated and modern’ made it possible to apply human rights issues to a local context. Miriam in turn should not be constrained by customs which took away her own ability to choose, not only choice of marriage partner¹⁷ but of future education and lifestyle. Her exercise of agency was at stake.

The cultural rationale for the ‘benefits to clans’ was spelled out in the affidavit which Muke prepared. Women are regarded as moving along the same channels through which wealth flows. They create ties between groups, since the children they bear become consanguineal

¹⁴ Ibid. at p. 133.

¹⁵ And, in fascinating commentary on Gewertz and Errington’s thesis, included the argument that traditional culture was ‘needed’ by Papua New Guineans in poor rural areas and urban squatter settlements: it gave people something meaningful in their lives.

¹⁶ Ibid. at p. 127.

¹⁷ That no specific partner had been identified was used on both sides, one to say that her freedom of choice was intact, the other that this could expose her to abuse. Note two contrasting incidents reported earlier by Michael O’Hanlon and Linda Frankland, ‘With a Skull in the Netbag: Prescriptive Marriage and Matrilateral Relations in the New Guinea Highlands’ (1986) 56 *Oceania* 181, at pp. 189–90. In the first, a woman’s personal choice of lover was retrospectively judged as satisfying a debt between two groups; in the second, a girl was marked in compensation, although no particular partner was designated for her, and she was dragged off against her wishes. O’Hanlon (personal communication to the author) subsequently writes that Wahgi people sharply distinguish between love matches and forced marriages – regardless of the rubric under which the unions are classified.

connections for the descendants. At the same time their work and fertility bring benefit primarily to the husband's rather than their own (father's, brother's) clan. It is appropriate that payments include 'compensation' for the 'loss' which the woman's natal clan suffers.¹⁸ So one clan will indemnify another first for a bride and then for the children the woman bears. When blood is shed, these ties are severed, and that in itself is an injury. The patrilineal kin who had been the ones to benefit immediately from the deceased's existence must find recompense for the maternal kin, who had vicariously enjoyed the embodiment of their fertility in the member of another clan. The aggrieved Konombuka demanded that a 'return' for the original woman be sent in back in marriage; Miriam was to be part of a 'head payment' (mortuary gifts owed to maternal kin).

The judge could see no objection to payment as such, and said that customary compensation practices involving 'money, pigs and other valuable personal items' (things) were no problem; however, when the payment takes 'the form of young single women' (persons) that is another matter.¹⁹ One concern was the degree of agency Miriam had been allowed – how voluntarily had she agreed to the settlement? He concluded that she was coerced into giving her consent, finding for ICRAF on all counts. Let me point up three aspects of the judge's conclusions. First, the judge paid considerable attention to understanding the background to the compensation settlement, helped by Muke's extensive and detailed affidavit. Secondly, nonetheless, '[n]o matter how painful it may be to the small ethnic society concerned, such bad custom must give way to the dictates of our modern national laws'.²⁰ Thirdly, he invoked a universalism enshrined in the Papua New Guinea Constitution: this particular compensation payment for the life of a human being was inconsistent with the National Constitution and repugnant to the principles of humanity. Running through all this was the distinction I shall designate as between 'tradition' and 'modernity'.

¹⁸ Not that the spouse's clan take away something which the natal clan could have enjoyed for themselves; only when female reproductive powers are transferred in marriage can the natal clan enjoy them, that is, when they are realised through the offspring which the woman bears and for which payments are made. Regarded as providing an ongoing flow of nurture and blessing through gifts, and ancestral (spiritual) support, for their child's children, their continuing 'fertility' is also duly recognised.

¹⁹ [1977] PNGLR 150; reported in *National*, 12 February 1997.

²⁰ [1977] PNGLR 150, at 153; *Independent* (PNG), 14 February 1997.

TRADITION AND MODERNITY

Whatever might have happened in the past, the enactment of this custom was now to be judged against a modern Constitution which protected women's rights. Invoking a line between Tradition and Modernity echoes the strategy which Pottage has described in the case of 'nature' and 'culture' used so adventitiously in the pursuit of patenting claims.²¹ Documenting what does or does not count as modern in contemporary practices is like documenting what does or does not count as human intervention ('culture') in discriminating invention from discovery.

The analogy with patenting procedure is helpful. If the determination is that nature is intact, then it is left alone – proprietary claims cannot be made. In the case of Tradition, if custom can be proved then it too is left intact; it is seen to have its own rationale. But if the investigation of nature has required the intervention of obvious human artifice, then what is discovered, by virtue of the attendant inventions, no longer belongs simply to the realm of nature. Similarly, if Tradition has already been modified by Modernity, then it cannot be appealed to in any simple way.²² Miriam's affidavit included the fact that she thought the Wahgi custom of 'head pay' marriages had fallen into disuse since the arrival of missionaries; this had been reported in the *Post Courier* at the beginning (9 May 1996) and was repeated again now (11 February 1997). In fact, the judge found the custom was still extant. However, and perhaps he was thinking of Miriam's aspirations for education and employment, relevant in his eyes was the fact that the framers of the Constitution 'were thinking about a modern PNG'. In other words, Tradition did not seem to be intact; already open to invasion by Modern values it clearly opened the way to a Modern interpretation of customs as either 'good' or 'bad'.²³

²¹ A. Pottage, 'The Inscription of Life in Law: Genes, Patents, and Bio-Politics' (1998) 61 *Modern Law Review* 740.

²² This was the provocation of James Clifford's argument in *The Predicament of Culture: Twentieth Century Ethnography, Literature and Art* (Harvard University Press, Cambridge, MA, 1988) apropos the Mashpee Indian land case. People laying claims were required to demonstrate 'pure' cultural continuity. (Occasional capitalisation is to remind the reader of the marked status of these terms in this account.)

²³ This was clear in a passage on which Gewertz and Errington, *Emerging Class in Papua New Guinea*, at p. 132 comment. To one ethnic society, Judge Injia said, the custom of 'head pay' involving women may sound offensive while it may not be to the ethnic group which practises it; the legislators of the Constitution were thinking about a

Custom as opposed to individual choice, tradition as opposed to modernity: these distinctions are implicated in one another, while each pair also derives conviction from the other. As we have seen, Judge Injia upheld the value of custom in certain arenas, acknowledging its function within the community, and thus recognising the force of tradition; at the same time, treating these issues as a bundle made it possible to put them all to one side together. Other things were also being bundled away.

Out of sight was any need to determine the kind of *obligations* in which someone such as Miriam finds herself enmeshed. An obvious example are the obligations entailed in having kinsfolk. It is as though kinship can simply be bundled up and disposed of as part of Tradition. And it is in putting such considerations to one side that an intellectual resource becomes lost to view: people's reflections on the fact of relationship and on what happens when (kin) ties between people become translated into expectations about acts and behaviour.²⁴

Now in the context of patent applications, Pottage raises the question of what precisely is to count as human intervention. When a technology becomes routinised, or when a natural code has simply been transcribed into a new medium as in the process of producing an immortal cell line,²⁵ what is 'inventive' about it? Given the extent to which the apprehension of natural facts is mediated by multiple layers of social representation, we might, he says, always ask what is 'natural' about the terrain which natural science has carved out for itself.²⁶ More to the point, through the litigations and disputes which accompany patenting in the field of biotechnology, what is to count as nature and what is to count as artefact becomes itself an artefact of political and legal decision-making. Concomitantly, in the context of modernising

modern Papua New Guinea, and about the 'promotion of good traditional customs and the discouragement and elimination of bad customs as seen from the eyes of an ordinary modern Papua New Guinean'. As Banks (forthcoming) points out, the upshot of this case was that a custom was declared unlawful (according to her, the first in Papua New Guinea).

²⁴ I am fortified in this argument by Banks, 'Women, Justice and Custom', who makes a similar observation about the complexity of kinship arrangements. Note that rendering kinship – anywhere – as part of Tradition is an old Euro-Americanism. (See A. Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Polity Press, Cambridge, 1991) and K. Finkler, *Experiencing the New Genetics: Family and Kinship on the Genetic Frontier* (University of Pennsylvania Press, Philadelphia, 2000).

²⁵ Pottage, 'The Inscription of Life in Law', at p. 752. ²⁶ Ibid. at p. 753.

customs, we might raise the question of what is to count as modern. But whereas Pottage can point to advances in biotechnology which have effectively challenged if not yet dissolved the lines along which various distinctions have been drawn, it would seem that here (in modernising customs) distinctions remain rampant, and kinship gets caught up in them.

This chapter attempts to extricate kinship and the question of obligations from the antithesis between Tradition and Modernity.²⁷ There is nothing special about this moment in time, however: the attempt could be, and has been, made at many times and places. Shades, for instance, of *Antigone* (cf. Fox 1993):²⁸ divine duty (to a brother) as opposed to civic duty (to the king). The instance recalls for me an element in Muke's seminar paper, and reported in the newspaper account of his affidavit, which falls unusually on English-hearing ears, namely his reference to divinity. The mother's clan, he said, 'had always exercised their divine curative powers' in helping the dead man prosper; they had not been the cause of Willingal's death as they might have been through the power of the curse which they also wielded.²⁹ In this conflict of duties, the ramifications of kinship, divine or not, fell foul of the state's view of itself as protecting the modern virtues. The Modern individual person as subject and agent was uppermost in the judicial mind.

BODY OWNERSHIP

Issues may be lost from view; issues may also be pushed from view. It is interesting to observe what it is that legal processes (choose to) step over rather than pick up, fabrication by default one might say. The vexed question of body ownership is a case in point.

Despite the difference between the cynical pragmatism of Anglo-American law and the French legal tradition for which the body is the

²⁷ Which is why we need Bruno Latour, *We Have Never Been Modern* (C. Porter (trans.), Harvester Wheatsheaf, 1993 [1991]). Current political investment in the concept of 'innovation' as a modern virtue has a heavy hand here, and helps perpetuate the Modern/Tradition antithesis.

²⁸ Robin Fox, *Reproduction and Succession: Studies in Anthropology, Law and Society* (Transaction Publishers, New Brunswick, 1993).

²⁹ John Muke, 'The Case of the Compo Girl: Kinship on Trial', paper presented to the Department of Social Anthropology (Cambridge, 1996); Sean Dorney, 'The Constitution, Change and Custom'.

inalienable foundation of legal individualism,³⁰ under neither regime can persons – including Injia’s ‘living men or women’ – be owned as property. Problems arise with embodiment, and the (Euro-American) symbolism which equates the person with the individual body. The scandal of slavery was that it involved trafficking in the *whole* body also understood to be the whole person. Not only was labour bought and sold, but so was autonomy of action, thereby depriving the person of agency.³¹

How is the Euro-American notion of wholeness or entirety fabricated in this context? The body seems to be taken as entire in the double sense of being a complete functioning (or once functioning) organism, and being of a piece with the individual person as subject and agent. There are equivocations. While, once animation has departed, a corpse may be treated as a whole body, no one would think of regarding it as a whole person – yet there are occasions when dead and living bodies have to be treated in the same way.

The image of the whole body produces a second image: the body that is not whole. There are an increasing number of circumstances under which it seems desirable to argue that whole bodies and part bodies should not be treated alike. (One argument put forward at the time of the 1998 European Directive on Biotechnology, concerned with the patenting of biological material, including human body parts, suggested that parts could be rendered patentable provided they could no longer be ascribed to specific individuals). However the general situation over body parts seems at present entirely equivocal. Some of this equivocation is discussed in the UK Nuffield Council on Bioethics’ Report (1995) on ethical and legal issues concerning the donation of body tissue, organs or reproductive material, and I shall draw briefly on this. Reminiscent of the way the plea and judgment in Miriam’s case avoided opening up questions about (kinship) obligation, it points out the lengths taken to avoid adjudicating on whether it is appropriate to talk of ownership over or property in body parts. Resort to a scheme of consents (to removal, disposal, and such) instead by-passes

³⁰ Pottage, ‘The Inscription of Life in Law’, at p. 745.

³¹ With any argument which brings in slavery, we should remember that we (turn of the century Euro-Americans) all know what slavery means (an assault on human dignity) and what our attitudes ought to be (it was a ‘bad’ custom); after all, historically-speaking, its abolition was bound up with the very development of the notion of human rights itself. When invoked, it presents the strongest possible image of the inalienability of the person-body seen as an entire entity.

the problem. Yet the issue of the kinds of interests one has in one's 'own' body and its parts, or of other people's bodies, and the circumstances under which these could amount to a property interest, is there in the background.

Distinctions which appear to occlude that background question also point to it. Primary here is the difference between treating the human body as a 'thing' and treating it if not as a 'person' then at least as pertaining to persons.³² The same difference is not quite replicated in (propped up by) *the possibility of treating body parts separately from the whole body*. People have in mind detachable organs and tissues. One effect of the Euro-American division between persons and things is to promote property rights (between persons with respect to things) as the paradigmatic exemplification of ownership – so that when one talks of property ownership one implies that rights are being exercised over [in relation to] some 'thing' or other. The more entities approximate to things, the more legitimate ownership appears. And perhaps one effect of unanswered questions about whether or not body parts constitute property is the realisation that detachment must be fabricated conceptually as well as physically.

What about other forms of ownership? I shall suggest that the question of obligation in the Papua New Guinean case offers a situation where we may, experimentally, talk of the ownership of persons. The Papua New Guinean material also suggests that there too parts are treated separately from wholes, although these connect to 'persons' and 'things' in very different ways.³³ We can at least ask of it a comparable question about fabrication: how are parts and wholes construed in the first place?

The following notes come from the Nuffield Report,³⁴ which has the virtue of being a coherent and straightforward account intended for the layman. It plays a rhetorical role in my argument by hammering home certain Euro-American presumptions about body parts. We can read it as a treatise on the making of 'things'. Persons do not really appear;

³² Both from having reference to personal identity and as a human entity to be accorded respect. Distinctions between elements which participate in one another's construction are propped up (John Law, *Organising Modernity* (Blackwell, Oxford, 1994)) by other distinctions; Pottage points to that between the non-commodifiable and commodifiable as propped up by that between persons and things.

³³ See below.

³⁴ Drawn from *Report on Human Tissue: Ethical and Legal Issues* (1995) chs 9 and 10, in places verbatim.

indeed it is obviously possible to discuss body ownership without explicitly bringing personhood into the picture at all.³⁵

English law at the time of the Report was silent on whether someone could claim a property right in tissues taken from them. Emphasising the lack of legal direction in this area (there was simply no case law on which it could draw), the Report suggests that a likely approach would be on the basis of whether or not consent to removal had been given. Where tissue was removed in the course of treatment, consent to treatment would imply abandonment of claim. Where tissue was donated, any claim would reflect the terms of the donation. The question of ownership, it says, is thus avoided. The view that common law recognises no right of property in a body is attributed to Tradition (the 'traditional view'), and avoiding the issue of ownership seems analogous to not interfering in Tradition, keeping it intact. Thus the legal instrument of consent can deal with changing (Modern) circumstances (such as the hitherto unimagined circulation of body parts) without challenging the traditional view in common law that one cannot have property in the human body. The traditional view was presumably formulated with the idea of the body as a whole entity.³⁶

Detachable body parts alter the circumstances. The Report is concerned with the extent to which ownership may or may not entail property rights, and here it draws on several legal contexts for comparative evidence.³⁷ Thus it points out that the issue of property has been avoided in the case of gametes: the Human Fertilisation and

³⁵ Unless we take the references to human beings as a background argument here, e.g. as in the statement that a prime ethical consideration is to show respect 'for human beings and their bodies' *Report on Human Tissue*, at p. 124, or 'human lives' and 'the human body', at ch. 6. By contrast debates concerning the embryo invariably touch on concepts of personhood.

³⁶ Except in marginal cases, e.g. surgeons' specimens. The traditional English view derives from, among other things, practices to do with disposal of corpses; the dead body lacking animation but potentially able to be reunited with its soul was a kind of limiting case (intellectual resource) for thinking about living bodies. Human corpses as whole bodies cannot be property although there is a duty to effect a decent burial and a corresponding right to possession for that purpose.

³⁷ The Report cites an example from the United States where abandonment is taken as an alternative to a person's intent to assert 'his right of ownership, possession, or control over [bodily] material', and takes this as an example of 'a property approach'. It suggests that some English statutory language implies a property approach – it is the language 'of things, of property, of the reification of blood and body parts' (*Report on Human Tissue*, at p. 70). It also mentions the notorious *Moore vs. Regents of University of California* (1991) case, where Moore failed to lay claim to the profits of

Embryology Act 1990 requires donors of gametes and embryos to consent to any storage or usage of them. 'By adopting a scheme of consents . . . [the Act] avoids vesting any property claim in the donor . . . *circumventing the need to resolve questions of property and ownership*' (my emphasis).³⁸ Nonetheless, the Report argues, the solution conceals 'a property approach' in that it contemplates that the control of gametes and embryos rests with the donor until that moment. It observes that the UK Human Tissue Act 1961 and others (e.g. Human Organ Transplants Act 1989) allow that tissue can be removed as an unconditional gift, that is, it becomes free of all claims. This does not of course tell us whether or not the gift is a gift of property.³⁹ Finally, the Report⁴⁰ gives a hypothetical example of how various concepts might work together. (1) The patient consents to an operation which involves removal of her appendix; (2) by her consent she abandons claims to it; (3) on removal it acquires the status of a *res* (thing) in possession of the hospital prior to disposal; (4) in response to a request from the patient for it to be returned, the hospital gives it to her as a gift; (5) 'the appendix then becomes the property of the patient'.

Commentators have argued that, once it is removed, living tissue axiomatically 'becomes the property of the person from whom it is removed'; removal itself does not entail intention to abandon. How so? Seemingly, tissue becomes (eligible for consideration as) 'property'

a cell line developed from his spleen because his claims to a property right failed. The equivocations are as notorious; the following comes from Paul Rabinow, *Essays on the Anthropology of Reason* (Princeton University Press, Princeton, 1996), ch. 7. The first (Superior) court held that Moore's informed consent to medical procedures had released his detached spleen for the doctors to work on. The second (Court of Appeals) reversed the decision: the majority verdict was that surgically removed tissue was held to be the patient's 'tangible, private property'; without Moore's explicit permission, there had been a 'conversion' – his property (cells and blood products) had been converted for someone else's profit. (A minority dissent argued against the application of private property principles without legislative guidance.) Finally the Supreme Court argued that although US law recognises a variety of interests in one's own body, it never created a property right in surgically removed parts. Since therapeutic tissue no longer supports the person's life, then the law regarding its disposition must be that of community health; there was no interference with Moore's right of ownership or possession because he had no title in the first place. California statutes in relation to organs, blood, foetuses, and so forth, deal with human biological materials as *res nullius* (as things but belonging to no one).

³⁸ *Report on Human Tissue*, at pp. 68, 69.

³⁹ My comment. An example of a non-property gift would be 'the gift of life'.

⁴⁰ *Report on Human Tissue*, at p. 68.

because *by its very detachment* it is made into a legal thing (*res*). What makes such a 'thing'? The converse holds. It seems to become (eligible for consideration as) a thing because *proprietary rights* can be exercised over it. I quote: 'The tissue may well, in fact, be abandoned or donated, but these imply a prior coming into existence of a *res* and the exercise of rights over it. Indeed such an analysis is logically essential . . . even if the resulting property (i.e. a person's assertion of a property right over a new *res*), exists merely for a moment (a *scintilla temporis*)'.⁴¹

If this argument is accepted then the appendix (above) would have remained the patient's property had she not by implication waived rights to it. However, this is not the end of argument. Another view has it that tissue at the time of its removal is *res nullius*, that is, a thing but belonging to no one until it brought under dominion ('the traditional legal example is the wild animal or plant', i.e. nature); the tissue then becomes the property of the one who removed it or subsequently acquired possession. The person from whom it is removed has no claim.⁴² As for the claims of those who detach and/or use tissue, it is unclear as to whether, for example, anatomical specimens can be appropriated as property: 'it is probable that the user of tissue acquires at least the right to possess, and probably a right of ownership over [it]'.⁴³ Indeed the Nuffield Report concludes that there is an overall lack of clarity in English law. Yet no one, it adds, could say that University College London does not 'own' Bentham's skeleton. However, it is that part of Bentham which is his skeleton, not Bentham as such, which UCL is considered owning. The body part is owned as a thing ('skeleton') not as a person ('Bentham'). Indeed we have seen that one way in which it becomes a thing is by being owned.

⁴¹ Ibid. at p. 69.

⁴² A Canadian working paper on human tissues and organs (1992) discusses the traditional view that there is no property in the body against the view that those from whom tissue is removed have some claim to it, and resorts to consent for disposal as a way round the impasse. It thus cites a French ruling that frozen sperm was not property on grounds that human reproductive material was neither inheritable (!) nor an object of commerce. But it did recognise a claim arising from the terms under which the sperm had been deposited in a sperm bank. 'In the name of dignity of the person, French law basically refuses the individual the right to dispose of his or her body and its parts; American law has allowed a greater latitude for proprietary and commercial relations concerning the body and person, privileging autonomy and value over an inherent and inalienable dignity' (Paul Rabinow, *French DNA: Trouble in Purgatory* (Chicago University Press, Chicago, 1999) at p. 93).

⁴³ *Report on Human Tissue*, at pp. 77, 81.

If this were not the case we might otherwise wonder about the odd tenacity of the term 'part'. After all, why is the detached and now free-standing entity thought of as a 'part'. Perhaps what is being fabricated is precisely the possibility of considering detachable parts of the body as 'things' to which claims of ownership may be laid. Owning the whole person is legally unthinkable; owning the whole body is prohibited. In a wonderfully illogical but perfectly sensible way, at the very juncture when through detachment it could be regarded as having ceased to be a part of the body, the tissue or organ is reconstituted neither as a whole entity in itself nor as an intrinsic part of a (previous) whole.⁴⁴ Colloquially, it is, somehow, a free-standing 'part'. So what is kept alive in this nomenclature is the process of detachment itself: it would seem that for as long as its detachability from the person remains evident it can be thought of as a 'thing' – but not to the lengths of a 'whole thing'. One interpretation could be that the designation ('part') refers to an essential incompleteness: the tissue or organ exists only in being destined for other human beings. Another could be that to conceptualise it as a whole entity would point too emphatically to an independent existence, on the market say, and thus to a thing which could easily become a commodity.

WHOLE PERSONS: THINGS

The Papua New Guinean material offers rather different shifts of perspective. It is based on a synthesis of anthropological analyses (as the Nuffield Report is a synthesis) and applies in the first place to societies of the Papua New Guinea Highlands, with my own inflection from Mount Hagen which abuts the Minj area, and secondarily to Melanesia at large. It suggests a situation in which it might be appropriate to imagine people 'owning' people. This is also the situation when persons appear as things, although 'thing' here has to be understood as a fabrication lying outside a property context.⁴⁵ Persons are owned as things through a

⁴⁴ As Moore tried to claim in asserting that his spleen was still a part of him (see n. 37 above). (Organs and tissue share features and a history with their original body, but so do many items otherwise regarded as entities distinct from one another.)

⁴⁵ I only feel comfortable about using the term 'thing' here because of the analytical support I can give it; in an abbreviated version I take a different tack (Strathern, 'Global and Local Contexts'). The obvious corollary should be added: analytically, it is also the case that anthropologists may or may not choose to identify relations as property relations (depending on their models of the political economy, the metaphysics of

politico-ritual fabrication⁴⁶ which presents the person being claimed by another as singular, entire, and *whole*. In other words, it is the whole not the part which is thing-like.

So what kind of thing is being imagined? I understand the techniques of much public (including ritual) activity of Highlands cultures as making relations visible, presenting them as objects of people's attention. Wealth items of the kind which flow in compensation payments objectify relationships by giving them the form of 'things' which can be displayed, such as money, pigs, and other valuable items. The same relationships may also be activated through 'persons': relations become visible in the positions by which persons divide themselves off from one another, as mother's kin may divide from father's kin and the one confront the other with its claims.⁴⁷ It is persons who emerge as partible, a point to which I return in the next section. In their multiple roles, persons are always half hidden from one another; in contrast, a form presented to be seen must be seen as a whole image is seen: an image

personhood, and so forth). Simon Harrison, 'Ritual as Intellectual Property' (1992) 27 *Man* 225, deploys the concept of property in analysing Melanesian material while respecting the peculiarity of a gift economy as opposed to a commodity economy. It is interesting that he avoids the person/thing distinction until right at the end of his paper. Like black boxes, one suspects that such (partial) eliminations are basic to any exposition of complex data.

⁴⁶ Politico-ritual, hereafter 'ritual', is an encompassing phrase for the public techniques through which a person is made (created, brought forth) to appear in a transformed state, including bride-wealth and mortuary ceremonies or, in the past, initiation. In the Papua New Guinea context, it offers an analogue to the kind of 'legal' intervention which the editors of this volume ask us to consider. It may be objected that I am not comparing 'like with like' (use of tissue with use of tissue). But there has been in the Papua New Guinea Highlands no disposal of tissue in the manner which compelled the Nuffield Council to produce its Report, any more than among Euro-Americans there are acceptable ways of talking about owning persons. My 'like with like' addresses the construal of bodily wholes and parts.

⁴⁷ For a summary of the processes of reification and personification, see Marilyn Strathern, *Property, Substance and Effect: Anthropological Essays on Persons and Things* (Athlone Press, London, 1999), ch. 1; for further explication, *The Gender of the Gift: Problems with Women and Problems with Society in Melanesia* (University of California Press, Berkeley and Los Angeles, 1988), pp. 176–82. The term 'entification', following closely on Thomas's 'substantivization', has been introduced to draw attention to contemporary engagements with the political and legal processes of development which lead to people presenting themselves and their land as entities or units (and see Eric Hirsch, 'Mining Boundaries and Local Land Narratives in Central Province' in L. Kalione and J. Leach (eds.), *Rationales of Ownership* (UBS Publishers, New Delhi, 2000)). I keep to 'reification' as including indigenous modes of presentation.

can only ever be a whole thing.⁴⁸ By form I refer to the contours, bulk, colour, gender of entities, in short to aspects of 'body'.

From this perspective people may be reified, just as wealth and similar items may be personified. For instance, men are reified, or self-reify, when presenting themselves in decorations which make them an explicit object of attention. Ritual intervention heightens one of the regular processes of social life in which the singularity of the person is manifest. The conditions under which people appear as things are also the conditions under which they appear as whole and singular entities.

This is, we may say, the singularity not of individualism but of relationism. In order to appear in another's eyes as someone of whom the other takes account, the person appears oriented to that particular relationship. So the person who stands for (objectifies) that relationship is in effect eliminating all others in favour of the one. Thus someone may be presented as 'an initiate' (in relation to a senior generation), 'a bride' (about to meet a groom), 'a clansman' (of this group rather than another), with his or her multiple identities eclipsed by the one of the moment. We could call that eclipse an abstraction or detachment. The person is abstracted from all other social contexts in order to exist, however momentarily, in one alone – like assuming a particular role or taking on a category position. Whereas the process of detachment itself belongs to the partitioning of persons, the image presents an already completed thing. It is the visible moment when 'an initiate', 'a bride', or 'a clansman', in appearing in 'one' form, in him or herself appears whole and entire. And the person appears whole and entire from the perspective of a specific other. It is to her husband's clan that a prospective wife exists as a bride – this is the image of the woman which they have, so to speak, created. They own it.

If I say, to experiment with Euro-American constructs, that persons may be owned when they appear as things, I can also say they are things because of their capacity to be seen by others as an embodiment of one particular relationship, that is, because they are owned. Let us pursue these Melanesian fabrications of things with reference to other

⁴⁸ However many images it is also composed of. You can have an image of half a something but, logically and phenomenologically speaking, you cannot have half an image (see R. Wagner, *Symbols that Stand for Themselves* (University of Chicago Press, Chicago, 1986)). A Melanesian take on Amazonian perspectivism (see E. Viveiros de Castro, 'Cosmological Deixis and Amerindian Perspectivism' (1998) 4 *Journal of the Royal Anthropological Institute* 469) might be to say that you can only own your own relationship to another person.

Euro-American constructs; I digress briefly on intellectual property and commodification.

In an inspired rendering of ritual as a kind of intellectual property, Harrison proposes that 'a useful way of viewing intellectual property is that it is the ownership, not of things but of classes of things, of their images or manifestations'.⁴⁹ But let me transpose that insight from ownership of ritual to one of the effects of ritual as a practice of intervention. If we ask what is owned of the person made visible – the image which has been created – then we might want to say it is *the idea or concept* of the relationship which they embody. When a male initiate steps forward all decked out in his transformed body, a new member of a clan, his clansmen own, so to speak, the concept of this person as 'a male clansman'. He has to look, act, and behave like one. His clan mates acknowledge him by claiming him; they see in him, at that moment, the embodiment of a concept. What they own is that concept or image of him manifest as his 'body', and they own it as they own themselves.⁵⁰ In Harrison's terms, the image as a typification is constructed of generic and universal elements – anyone in this role will look like this. That is what ritual requires the particular initiate to act out.

Leach comments on male initiation practices among a people from outside the Highlands, Nekgini speakers of Madang Province, which are predicated on the fact that a man is nurtured on his land:⁵¹

The work of the father and his kin, and of the land they nurture children upon, is to produce *potential* from which form can be made. There is nothing mystical about this process, as that form is one which is given by

⁴⁹ S. Harrison, 'Ritual as Intellectual Property'. A ritual exists as a shared thought-object, 'a piece of frozen, objectified social action, with all contingency and indeterminacy reduced to a minimum . . . to perform it is to try to express that pre-existing intellectual object in social action' (at p. 235). He argues more generally, and beyond Melanesia, for seeing insignia, ceremonial, and religious practices in this way.

⁵⁰ Although my generic formulation is meant to be applicable across a range of Papua New Guinean and Melanesian situations, I am particularly stimulated here by Daniel de Coppet's account from the Solomon Islands ('Are'Are' in C. Barraud, A. Iteanu, and R. Jamous (eds.), *Of Relations and the Dead: Four Societies Viewed from the Angle of their Exchange* (S. Suffern (trans.), Berg, Oxford, 1994). Melanesian peoples variously envisage what Euro-Americans might call the *concept* of a person as a person's image. Thus 'Are'Are' distinguish the body from its animation and from its 'name' or 'image'.

⁵¹ James Leach, 'Drum and Voice: Aesthetics, Technology, and Political Relations in a Rai Coast (Papua New Guinea) Society', J. B. Donne Prize Essay, Royal Anthropological Institute.

the set of relationships into which that potential person is propelled. *The boy is this man's nephew and not another's, this set of cross-cousins' joking-partner, not another's.* (emphasis added)

The father's affines (his wife's kin and their spirits) give *form* to the appearance of the boys at initiation as a result of the kind of nurture they bestow. (The boys' substance comes from their father's land.) Now the importance of initiation being carried out among the particular persons who give his social presence its particular form depends on there also being a sense in which they bring into being the universal/generic 'sister's son' (in Reite, it might be truer to say 'affine's son'). Through their actions they reify this specific man as at once 'their' sister's son and as their 'sister's son'. The latter is an abstraction, an image, an idea. The same ritual can be performed for any boy precisely because each is an instantiation of a 'sister's son'.

And through the intervention of the compensation agreement, something very similar was to have been Miriam's lot. Members of her clan claimed dispositional control over their sisters and daughters, while the clan to which she would be joined through the marriage had claims on her as a prospective wife and mother. The moment at which Miriam was detached from all her other relationships and appeared as the single and whole embodiment of the *concept* of reciprocity between the clans was the moment at which we could talk of the two sides both enjoying 'ownership' in her.⁵²

This allowed people to draw on multiple rationales for the overall gift, comprising homicide compensation for the secondary cause of death, mortuary payments to maternal kin ('head pay'), and reasons to do with past marriages between the groups. At one point Muke insisted that, as an element in the overall payment, this last was the principal rubric that applied to Miriam (she was not being 'sold' as part of a (homicide) compensation but returned as part of life-cycle payments). To recapitulate, the general conditions of a mortuary payment were relevant. A clan sending out its women in marriage contributes to the prosperity of other clans; through its offshoots – a sister's child is called a 'transplant'⁵³ – maternal kin expand their own spheres of influence. So if these progeny prosper through their guardianship, then in turn, as

⁵² This was made complex by the fact that she had been brought up by her maternal kin, from a part of the same tribe into which she was now to marry, and that at her father's death they assumed they had rights of bestowal over her.

⁵³ See O'Hanlon and Frankland, 'With a Skull in the Netbag', at p. 185.

we have seen, death injures them. When their 'transplant' was terminated, observed Muke in his affidavit, the 'root people' on one side felt that the other side had violated their divine relationship. In local idiom, the deceased's 'bones' or 'head' (male wealth) should be sent back by the patriclan to the (maternal) clan which had in its lifetime overseen its welfare. Such wealth, the head pay, is regarded as regenerative for the future. But if kin request that an actual granddaughter of the woman be returned, then they are thinking of how their groups have intermarried in the past. They look for a 'skull in a netbag', that is the strength or value (bones) of a woman's progeny in and within the form of another woman (the netbag or womb), as O'Hanlon and Frankland describe.⁵⁴ A woman who marries under the rubric of a skull in a netbag, as Miriam was doing, is meeting obligations set up by previous marriages.

What kinds of body parts are these 'bones' and 'womb'? I suggest that the bones are not conceptualised as 'parts' but rather as wholes; they are the whole body made manifest from the perspective of the claimants. That is, the wealth they see from the hand of the donors is equated with the claims they have (in the image of strong bones): they own the person in the form of the bones (wealth) they can expect in return.⁵⁵ And it was not any, generic, woman (womb) who would satisfy the need for the maternal kin to recover what it had given in the past. A particular relationship was singled out: she should be someone standing in the relation of granddaughter⁵⁶ to the actual woman earlier sent in

⁵⁴ Ibid.; and see Muke's affidavit [1997] PNGLR 132.

⁵⁵ When relationships are made visible through things appearing in a specific form, we can refer to a person's relationships with others being embodied in an artefact, wealth item, or whatever (hence the wealth accompanying Miriam as the 'bones' of the deceased man). Since the entire relationship between the two clans is summed up in those bones, the bones exist not as a part but as an entirety: *how the person now looks from the perspective of that relationship*. (The flesh and blood they helped make come back to them in the form of bones; the classic reference here is R. Wagner, 'Analogic Kinship: a Daribi Example' (1977) 4 *American Ethnologist* 623, and see Viveiros de Castro, 'Cosmological Deixis'). Abstract as these formulations seem, they come from the analyses of ethnographic data by many Melanesianists, which provide among other things iconographic support. For a Pacific wide view, see Alfred Gell, *Art and Agency: An Anthropological Theory* (Clarendon Press, Oxford, 1998).

⁵⁶ Or a surrogate, a classificatory granddaughter who could stand for such a person. The significant tie of descent here was from the ancestress to the man or men who bestowed the woman in marriage. O'Hanlon and Frankland, 'With a Skull in the Netbag', at p. 189 observe that at stake was less ensuring a marriage between partners already in a pre-existing relationship (as anthropologists have often analysed

marriage. Hence the importance of each side owning 'a granddaughter', embodied in Miriam, that one could give and the other receive.

A thing created through commodification also embodies a concept; its value must be specifiable in abstract terms against equivalent items. Recall the Mount Hagen Lodge conversation which included a discussion of bride-wealth;⁵⁷ the proprietor's nephew had observed that with money as the medium of exchange women became like commodities: 'money made women equal to anything and everything one might want to buy in a way they were not in the past' – not just equal to things, one might observe, but substitutable one for another.⁵⁸ This is the process which Minnegal and Dwyer describe when people turn from exchanging to selling pigs (my emphasis for theirs).⁵⁹

A pig is brought to an exchange not as a pig *per se* but as a *particular* pig. Its particular constellation of attributes, and its history, make it not only appropriate but, in a real sense, the only appropriate offering. Where pigs are sold, by contrast, attributes such as size, sex, and colour may influence the going price but no longer bear upon the appropriateness of the particular pig to the intended transaction. A pig is suitable for sale simply (i.e. universally) because it is a pig. *Thus it seems that the idea of 'pig' itself has become reified.* The boundary between 'pig' as a category and other things has become more salient in guiding social action than the differences between particular pigs.

Note that the 'thing' created through commodification carries information about itself with it, and does not require contextualisation

prescriptive marriage rules between cross-cousins) than meeting a debt created by a previous marriage. The debt might or might not be tied into death compensation payments; it could be settled by a man despatching any girl whose marriage choice he controlled. However, such arrangements had to preserve the concept that the woman was acting as a third generational return ('granddaughter') for a woman previously given. Whoever occupied this role, genealogical surrogate or no, occupied a specific role (granddaughter) because of the specificity of the grandmother to whom the transaction referred. The return was not for any woman in the previous generation, but for a particular female ancestress whose identifiable progeny bore concrete testimony to the fertility of her natal clan. (We do not know, says O'Hanlon (personal communication) whether Miriam had already been designated in this way, but the evidence suggests not.)

⁵⁷ Gewertz and Errington, *Emerging Class in Papua New Guinea*, at p. 127.

⁵⁸ Melissa Demian has also commented on this, *Truth, Trickling and Weight in Suau Disputes*, Report to Fifth PTC Workshop (Cambridge, 2000).

⁵⁹ M. Minnegal and P. Dwyer, 'Women, Pigs, God and Evolution: Social and Economic Change Among Kubo People of Papua New Guinea' (1997) 68 *Oceania* 47.

beyond its evaluation in relation to similar entities. This is how initiates may be compared to one another, as are brides over the generations during which clans have intermarried. Unlike a commodity, however, although a person may be presented as a 'thing' with generic and universal attributes, far from being detached from its social origins each image points precisely to the source of their creation. Moreover, sisters' sons may all be alike in the form and conventions by which they display their tie to their mother's brothers, but substitutability is likely to be hedged around with restrictive rules. There will be (kinship) preconditions about 'classificatory' equivalents, that is, as to who qualifies as a stand in – which mother's brothers will count what persons as sister's sons. 'Ownership' applies only if certain relational preconditions are met.

These two digressions bring us to the question of what rights ownership brings. What entitlements flow from the ownership of an image? In the case of ritual as performance one may well be able to imagine reproductive rights such as copyright, as Harrison suggests. The entitlement to perform a ritual, or produce a song or dance, anticipates the (particular) realisation of a conceptual entity. Certain people may lay claim to the knowledge involved or to rights of sponsorship or performance; these may or may not be entitlements which can be transferred to others. In the case of persons, compensation or other forms of reciprocity are designed to provide an abstract equivalent to the 'value' once embodied in a now absent other. The claims of Miriam's father's mother's kin included the fact that they had been deprived of a reproductive opportunity – not as a matter of the continuing existence of the deceased person but of their continuing relationship through him to others. However, the question of deciding what might or might not count as rights does not take us very far. Rather, consider, as the editors invite us to consider, the question of what public intervention, legal or ritual, creates. Having set up the possibility of persons being owned, as thought-objects and as things, I am forced to the conclusion that it is in the very activation of ownership as a question of rights and claims that an intervention of a kind has already taken place.

Euro-Americans understandings of property ownership invariably entail the ownership of 'rights' (one owns not the thing as such but rights in respect of other persons in relation to the thing).⁶⁰ Yet rights

⁶⁰ I do not pursue the Euro-American concept of rights and the directions into which a search for a Melanesian analogue might take us – debt, for instance; for an initial enquiry see Demian, 'Truth, Tricking and Weight'.

is an awkward idiom for the ideas of ownership I have been referring to, where ownership seems a question of expanding or augmenting identity, an entitlement which allows those – and no others – who claim ownership to re-state their own identity (maternal kin to the sister's or daughter's child). People readily enough assert claims attendant on such connections, staking them out in a manner that looks like claiming rights, but as an intervention – as an action – mobilising claims shifts the perspective they have on one another. Here we shall need to remind ourselves of the difference between wholes and parts. If it is plausible to suggest that what is owned is an image of a person (a concept), then only an entirety can be owned; rights and claims set up a different social field altogether, and one where nothing seems entire. The dispute over Miriam shows this.

PART PERSONS: AGENTS

There is no simple sense in which one can translate 'body part' into the Melanesian vernaculars I have been dealing with; at the same time the notion touches at such provocative points on the way *persons* might be partitioned that the comparison is inviting to pursue.

I talked, with particular reference to the Papua New Guinea Highlands, of the presentation of persons as whole forms or 'bodies'. Objectified from the perspective of others, the person (the thing-image) is in a specific and thus singular relationship to them. But whole bodies are, in another sense, part-persons; from a second perspective which these other persons have, what they see is divided substance. For as well as being singular, persons can also be plural. Since the 'whole' person is detached from other relations, then taken together these relationships compose the person as an entity with a multiple or plural character. This produces another perspective on the body.

The body's health and sickness are regarded as the outcome of an amalgam of *actions* on the part of multiple others. In this sense it is an assemblage of parts, not as limbs or organs or tissue, but as paternal and maternal substances – bone and flesh or blood and semen. Or at least that is the rationale given to various transactions. Indeed, the very possibility of compensating persons for the pain they have suffered (the blood of childbirth), for nurture they have bestowed (mother's breast milk) or injury (damage to the body) fabricates a view of the body as partible. Through their actions, including giving or withholding

blessings or curses, people bestow bodily energy on one another. As a result, a person's substance may be thought of as body which is a part of other bodies. Who pays and who receives delimits the claims. Thus the mother's clan claim the child because they are due wealth for it; the father's clan claim the child because they are able to pay wealth for it. Each side, in 'growing' the child for the other, reproduces itself not just through the child but through each other. We can, then, imagine the person as distributed or dispersed (see Gell)⁶¹ across a spectrum of relationships, belonging to diverse groupings. But while these relationships converge on the one person (rendering the person a composite of diverse ties), the ties as such are dispersed, and can never be gathered together in anything but that person. They do not form a further 'whole' of which the person is a part, as Euro-Americans like to imagine the individual as part of society. If we construe these relations as 'parts', then the only entity they can be part of is a person.

The shift in perspective is created by taking action. For at the moment when claims or rights are activated, the singular person (the abstract thing-image) is then seen to have many social origins, to be a partible entity combining in itself many particular concrete histories. The point at which a claim is translated into a gift or the carrying out of a duty is the point at which the 'one' relationship is (re)perceived to be one among 'many'. The person has other possible destinies.

Let me explicate further. As soon as 'ownership' is realised in the activation of claims, persons have to deal with one another as agents. And as soon as relationships are realised in the activation of ownership, people divide themselves off from one another. What the mother's brothers thought they owned as a product of their own nurture or protection now appears to have been the result of nurture at others' hands as well, spirit as well as flesh, semen as well as blood. This is because when action is taken, or when wealth is mobilised or someone seeks to meet an obligation, decisions have to be made, and these bring into the foreground all those other relationships which demand taking action, sending wealth, or meeting obligations. 'Realisation' creates its own moment in time, even if no more than a *scintilla temporis* (see above). Taking action is itself an intervention in that an abstract category now becomes a particular entity in a history of particulars. Perhaps the very idea of right or entitlement or claim is usefully thought of as ownership in an already activated form. Here what they own, and I take my cue from

⁶¹ Gell, *Art and Agency*.

an observation by Kalinoe,⁶² is how (the manner in which) persons 'belong' to one another.

In the Minj compensation settlement, there were many strands of relationships, past events, and old debts being brought together in what would be the 'one' transaction it was hoped would answer them all. But that one transaction was in turn to be composed of items of wealth collected by many contributors, where each would find himself faced with other, competing, demands on his resources. 'Choices' had to be made (eliminating one from multiple ways of acting). If acting requires choosing between alternatives, these are basically choices between relations – and thus invariably invoke prior relations. Here one arrives at a local understanding of agency. Agency is *evinced in the ability of persons to (actively) orient themselves or to align themselves with particular relationships*,⁶³ however foregone a conclusion that decision may seem to be. This is not the same as free choice (indeed someone may have few options in the matter) and does not translate directly into the kinds of act of choice by which the Modern person can be recognised.

Kinship is necessarily predicated on 'prior relations', on the fact of relationship. Muke's analysis of the Minj case pinpointed the crux of the matter:⁶⁴ 'Kinship on trial'. It was not just the clans on trial, but a whole set of suppositions summed up in the term kinship – the nature of relationships as a matter of people's conduct and obligations towards one another. Thus Miriam is quoted as saying that she initially agreed to the compensation settlement out of concern for her younger sisters and other clanswomen who might be asked if she refused.⁶⁵ In her affidavit, as rendered by the judge, she stated that she was willing to be part of her father's 'head pay', but not willing to marry immediately or to marry

⁶² Personal communication to the author.

⁶³ Recalling the question, prompted by the Nuffield Report, about why body parts continue to be called 'parts' (in their detachability they are things without necessarily being commodities), we may say that it is the Melanesian 'person', as described here, who is in a state of perpetual detachability. The partible person is constituted in the process of detaching relations from relations. (On singular and plural, see Strathern, *The Gender of the Gift*, at ch. 1; as to the conceptual distinction between person and agent: 'The person is construed from the vantage point of the relations that constitute him or her: she or he objectifies and is thus revealed in those relations. The agent is construed as the one who acts because of those relationships and is revealed in his or her actions' (at p. 273).)

⁶⁴ Muke, 'The Case of the Compo Girl'.

⁶⁵ Gewertz and Errington, *Emerging Class in Papua New Guinea*, at pp. 125–6.

just anyone.⁶⁶ Whatever one might think about her predicament, and whatever pressure she was under, we are left with the fact of relationship: how to take into account the obligations which they entail. As Muke implied, what does one do – what action is to be taken – about the fact that one clan is in perpetual spiritual debt to another for the welfare of its progeny?

A set of very particular claims lay behind Miriam's selection. She was already well known to her father's maternal kin, and had in fact been living with them since her mother was sent there for safety during previous fighting while the father, Willingal, stayed back with his paternal clansmen. In fact, this family – Willingal's two wives and five children – had been one of several Tangilka living there as refugees and had as yet paid no 'rent' to their hosts. Moreover, Miriam's father's mother's clan had sent many wives to her father's clan who had borne many sons to strengthen it, while few women had come in return.⁶⁷ These were all perceived as putting the one clan into the other's debt. Miriam's marriage would help adjust the imbalance. In short, from this perspective the case concerning Miriam and her maternal and paternal kinsfolk is all about the nature of obligations and how people meet the debts they perceive. The claims which bear in on the actors as immediate reasons for their actions are based on the fact of their relationships with one another.

The National Court judge took this on board in his response. Yet it was the degree of obligation to which he apparently objected. Judge Injia found that obliging a woman to be part of a 'head payment' was an infringement of her constitutional rights. For example, her right to equality of treatment was violated because the custom only targeted eligible women and not men (cf. Dorney).⁶⁸ Moreover, he opined, while

⁶⁶ She then went on state that she felt pressured into probably having to make a quick match, and that the payment process left her feeling humiliated in the eyes of others, 'ashamed at being used as a form of compensation' (ibid. at p. 130, quoting the judge's summing up). Indeed, at her first interview with the press (Palme, 'Miriam: Torn Between her Tribe and Herself'), she was reported as upset and shocked by the decision; the same reporter also pointed out the power imbalance between the two sides, the Tangilka being scattered through warfare over the district while the Konombuka, who had taken some of them in, was one of the biggest clans in the area: they 'had the upper hand and were taking full advantage of it'.

⁶⁷ The two tribes had exchanged five generations of women in marriage; women coming from Miriam's paternal mother's clan had produced more offspring than those from Miriam's own (paternal) clan who had gone in return (Muke [1997] *PNGLR* 133).

⁶⁸ Dorney, 'The Constitution, Change and Custom'.

an open request placed an obligation on any of a clan's girls, the closer the relationship then the greater the pressure.

How, then, does the final verdict of this careful and sympathetic judge avoid the fact of relationship? Once again the Tradition versus Modernity rubric comes into play. Pitching the issue of obligation in terms of obligations *between groups*, tribes, and clans, had the effect of invoking a community whose interests were against those of the individual. In focusing on the way in which groups bring pressure to bear on individual women, this judicial opinion rehearses a familiar position. Obligations start looking like communal and thus cultural constraints, and cultural constraints somehow belong to the domain of tradition and custom. Yet when Miriam herself talked she had in mind specific individual kin, 'living men and women', of whom she was thinking. She was after all an agent in this herself.⁶⁹ In an interview with the Port Moresby *Post Courier* (20 February 1997),⁷⁰ she said she was fearful about the way her clanspeople would interpret 'the law' (the judgment which had been given a few days earlier). She was reported as wanting her people to really understand the court's decision: her worry was that '[h]er people think the court has given her "freedom" from a traditional obligation and this could take away her tribal support'.

So Miriam also resorts to the notion of Tradition. It is an open question whether she was referring to cultural constraint or to the exercise of her own agency. Whichever it was, the latter was not going to be heard. To acknowledge claims as 'obligations' in the context of kinship looks to Modern eyes as perpetuating dependency, control, and coercion. Human rights discourse – grounded in equality between

⁶⁹ My observation; her agency, manifest in her orientation towards these diverse kin, is not to be denigrated. See n. 17 above and O'Hanlon's observation about free and forced marriages. In itself, the 'skull in a netbag' arrangement is often a matter of retrospective classification if a match can be found to fit the bill: these are not 'remorseless customary practices which demand to be over-ridden by respect for individual autonomy' (personal communication). Margaret Jolly, 'Woman Ikat Raet Long Human Raet o No? Women's Rights, Human Rights and Domestic Violence in Vanuatu' (1996) 52 *Feminist Review* 169, at p. 183 in her comments from Vanuatu, adds a qualification to the notion of tradition relevant to Miriam's remark below: 'human rights are not necessarily inconsistent with kastom [Bislama, 'tradition'] . . . [and] tradition is not a static burden of the past but something created for the present'.

⁷⁰ Interviewer not named; the heading is: 'Court Compo Ruling Proves a Mixed Blessing for Miriam'.

individuals – sweeps all this away. Muke's question was whether it was also to sweep away kinship as such.

DECONTEXTUALISATION

I have taken the Euro-American duo, person and thing, as far as it will go for the kinds of Papuan New Guinean materials presented here. Persons turn out to be most 'thing'-like (embodying a concept) when they are regarded as unitary, whole, and abstracted from all social contexts but one, and most 'person'-like (partible) when they find themselves engaged across a plethora of relationships in multiple contexts. Under the first rubric I have wondered whether it is apposite to refer persons as 'owned'; the second leads to claims and rights, and here a person in orienting him or herself towards specific relationships can act only for him or herself. In the former circumstance, what is owned is a concept or image of the person, made visible (reified) through the 'body'. This is an ownership which augments the owner's status, as Miriam's grandmother's clan increased its sense of itself through the fertility it bestowed on another. Her offspring, such as Willingal, their sister's child, would appear to them in that singular and ideational form as an exemplar of a 'sister's child'. In the latter circumstance, when the fact of relationship – that a person is always a composite, a part of a plurality – is translated into action, this makes visible the obligations and expectations through which kin in belonging to one another are bound to and divided off from one another. Action includes acknowledging debts to be discharged, including in turn debts owed for life.

Miriam's case invites us to think again about legal interventions which appeal to human rights. We may think of human rights fitting an anonymous entity abstracted from all social contexts bar one (common humanity) or else, to the contrary, as investing the subject with the dignity of choice (between multiple options). But what about the nature of obligation as it inheres in human interactions, the expectations of dependency in the sense recently revived by MacIntyre?⁷¹ Human rights discourse, at least as invoked in this case, would seem to have no place for the fact of relationship.

Something similar but not identical to this criticism has been voiced by anthropologists commenting on human rights interventions.

⁷¹ Alasdair MacIntyre, *Dependent Rational Animals* (Duckworth, London, 1999).

Wilson⁷² strongly advocates greater anthropological application in the arena, an intellectual resource which he suggests is underused.⁷³ He would like to see a comparative study of human rights focused on the ways transnational discourse materialises in specific contexts.

In order to address human rights violations, the anthropologist does not have to choose between copying the supra-local universalism of legalistic declarations and giving in to a relativity which deems that any local representation is as good as any other.⁷⁴ Focus should be on the middle ground between the local and supra-local. Anthropology, Wilson says, is well suited to judge the appropriateness of particular accounts of abuse, to pay attention to historical and biographical circumstances, to assess concrete examples according to the context in which they occur. It could show how people engage in human rights narratives from their own vantage points.

Rapport⁷⁵ reviews Wilson's insistence that we live in a 'post-cultural' world where human rights belong to global governance. This is a polity which 'posits individuals as ontologically prior to the cultural milieu which they create'.⁷⁶ It is individuals who animate and transform cultures: individual actors are 'the anthropological concrete'⁷⁷ who can adopt or reject cultural *personae*. 'In short, the liberal polity which is to be globalised is one which publicly respects the rights of the individual citizen to his own civil freedoms *against* cultural prejudices' (original emphasis).⁷⁸ In this view identities at once come together and

⁷² Richard Wilson (ed.), *Human Rights, Culture and Context: Anthropological Perspectives* (Pluto Press, London/Chicago, 1997); cf. Nigel Rapport, 'The Potential of Human Rights in a Post-Cultural World' (1998) 6 *Social Anthropology* 381.

⁷³ Although he criticises anthropologists who avoid universalisms and retreat into cultural relativities, Wilson acknowledges the out of date concept of culture that the critics of cultural relativism in turn often use. Yet (he argues) to insist on the relativism of cultural diversity, as he claims anthropologists often do, is to neglect both the forces of hybridisation and globalisation and a principal contemporary arena in which ideas about common humanity are voiced: human rights discourse. Where, he asks, have the anthropologists been in developing notions of common humanity?

⁷⁴ For a cogent exploration of this dilemma in a Melanesian context, see Jolly 'Woman Ikat Raet Long Human Raet o No?', who also points to the work of Michael Jacobsen on human rights and cultural specificity in Papua New Guinea. C. Banks, *Developing Cultural Criminology: Theory and Practice in Papua New Guinea* (Institute of Criminology, Sydney, 2000) is germane here.

⁷⁵ Rapport, 'The Potential of Human Rights'. ⁷⁶ Ibid. at p. 386.

⁷⁷ Marc Augé and John Howe, *Non-Places: Introduction to an Anthropology of Supermodernity* (John Howe (trans.), Verso, London, 1995).

⁷⁸ Rapport, 'The Potential of Human Rights', at p. 386.

remain distinct, and one can investigate human rights without entering into universalisms. It does not mean having to harmonise different moralities:

All one expects is a common respect for the procedural institutions of the polity which seek to balance, in an *ad hoc*, concrete, case-by-case fashion, the competing demands of diverse perspectives while not serving the exclusive interests of any one.⁷⁹

The manner of intervention would thus acquire its own significance: procedural rules become the candidates for universal application. If 'human rights' are understood as political procedure (human rights as a 'transnational juridical process'), then 'culture' becomes 'an optional resource', one to be employed by individual actors on a global stage who are free to create identities for themselves.⁸⁰ It is a modernist position, of course, to imagine that one can choose. Much of the rhetorical justification for culture is in fact cast in terms of allowing people (the 'right') to practise their customs as they always have done; conversely critiques of conservatism perceive cultures as blindly clinging to practices which modern sensitivities find repugnant.

Wilson wants to build a theory about the operation of rights. Legal right based on equality before the law implies the subject being stripped of social circumstance, as when descriptions of victims abstract them from their family and class background.⁸¹ Yet, he argues, while human rights discourse models itself on legal discourse, it does not have to. His plea is for anthropologists to address themselves to specific interventions, and thus provide the crucial local contexts in which decisions are taken. Contextualisation is a familiar and powerful intellectual resource. Thus an anthropologist might readily observe of Miriam's case that there was bound to be more to the two clans' actions than the acting out of 'tradition', 'custom', or 'culture'. Explicating the ramifications of indebtedness which lay between the people to whom Miriam was related affords just the kind of socio-historical contextualisation, the middle ground, which Wilson regards anthropologists as being in a prime position to supply.

Yet are we limited to fabricating that middle ground from the intersections of the local and supra- or trans-local global? A contextual analysis is insufficient if it simply supplies supplementary circumstances for

⁷⁹ Ibid. at p. 385 (after Rorty).

⁸⁰ Ibid. at pp. 387, 388. ⁸¹ Wilson, *Human Rights, Culture and Context*, at p. 146.

an action, reasons at a remove. I see more interest in fabricating a 'middle ground' as its own order of phenomenon. Pace Augé, I would return to the foundational anthropological concreteness: relations; and thus give more weight to what Wilson slips into the following (emphasis added):⁸²

If human rights reports strip events free of actors' consciousness and social contexts, then part of the anthropologist's brief is to restore the richness of subjectivities and chart the complex *fields of social relations*, contradictory values and the emotional accompaniment to macro-structures that human rights accounts often exclude.

For the next sentence gives it way again when he says that social relations are what trace local connection to macro-global processes. It is clear that he is thinking of relationships as mainly supplying the context which has been taken away. Yet, in my view, to regard relations of indebtedness, as in Miriam's case, as a matter of 'context' or 'background' is to tell only part of the story.⁸³ The relationships between the two clans were carried by persons themselves involved in very particular sets of relations to one another. My own plea would be that we have to treat social relationships as a complex (complex as in complexity) field of its own. This will give us another order, another perspective altogether.

We certainly do not have to go on re-inventing the contrast between Tradition and Modernity. There are other intellectual resources to hand. If we take the notion that culture is carried by persons, a Papua New Guinean might say that persons are also carried by other persons. Individuals do not interact 'with' culture – they interact with persons

⁸² Ibid. at p. 15.

⁸³ Many of the contributions (to *ibid.*) address context – historical, social/cultural, politico-economic – without exploring the issue of concrete relations. In respect of a murdered Guatemalan anthropologist, Wilson points out that none of the human rights reports deal with her situation as a professional social researcher, nor mention her child who was in the field. 'By disengaging an agent from their socio-historical circumstances, what we are left with is a universal decontextualised individual which is the basic unit of liberal political, economic and legal theory' (*ibid.* at p. 148). He contrasts this with the regular anthropological view: 'As opposed to a universal maximising individual with a natural set of rights, there are [in the anthropological view] social persons who are engaged in the making and remaking of complex interconnected social processes, and whose rights in those contexts are not natural, but are the results of historical struggles for power between persons and corporate groups' (*ibid.* at p. 148).

with whom they have relationships. While it may be consciously in accord with 'cultural values' that they follow this or that path, much of the motivation to act comes from the claims which bind them to others. There is therefore a non-optional aspect to the relationships into which people are locked, producing a situation in which, once brought into being, the very fact of relationship becomes a condition prior ('ontologically prior') to action. Miriam's case may offer local examples but they are examples of a thoroughly trans-local social fact. People are nowhere 'free' to create relationships. This is true both because every relationship has a momentum and character of its own, that is, must take the form of a (specifiable) 'relation' and thereby embody a particular image of itself, and because each relationship involves other parties, at a minimum in sustaining the relationship. To put words into Miriam's mouth that one might want to put into anyone's mouth, perhaps she would like to be able to fulfil her obligations.⁸⁴

INTELLECTUAL RESOURCES

Wilson's criticism was provoked by the de-contextualisation he sees in human rights reporting. Anthropological expertise in re-contextualisation could redress the imbalance, a scholarly intervention with the potential of being an activist one as well. However, there are resources which lie beyond anthropological procedures.

The problem with human rights reporting is not so much detachment from context as such, a logical impossibility, but the removal of an entity from one context into another. The victim is *re-described* in the kind of bare detail similar to a presumption of (human) equality before the law, the new social context being the universe of others who have suffered human rights abuse. The criticism is that, in avoiding personal detail in the name of the essentials of fundamental equality, human rights reporting can lose everything one would want to know about a person's circumstances, career, family. These are all part of that person's 'life', and Wilson observes that it is often that life which has been put at risk or abused. Only the particularity of circumstances would define what an entitlement or right could mean in those specific conditions under which people live. Yet, in my view, we will not get very far with understanding the deficit only as a deficit in cultural understanding. It is a deficit in social analysis. We would be losing (out on)

⁸⁴ With all due regard to the dangers into which patriarchy propels the dutiful daughter.

an intellectual resource not to take into account the diverse ways in which persons visualise themselves as carried by other persons and, for better or worse, by their relations to others.

Complaining that human rights discourse renders people as little more than 'things' is a customary Euro-American accusation (respect for individual persons is incompatible with treating them as things), whereas of course the whole elevation of the victim's status to do with human rights violation would have been premised on such accusations in the first place. The Melanesian construct, as I have synthesised it, of the reified person as a thing-image offers a different route, and one which dares us to begin specifying what it is as human beings we might own of one another.

CHAPTER EIGHT

RE-VISUALISING ATTACHMENT: AN ANTHROPOLOGICAL PERSPECTIVE ON PERSONS AND PROPERTY FORMS

Susanne Küchler

Anthropology and law share certain understandings, the roots of which can be traced to early nineteenth century romantic philosophy. This shared heritage is especially apparent in the entrenched debate over the copyrighting of cultural property, as new nations strive to formulate laws that would protect culture as a form of property. The legal notion of property, based on a model that separates ideas from cultural products and seeks to protect creative agency, is now experienced as being in conflict with radically different expectations of how attachments are formed and thus also best protected – expectations that are grounded in a notion of agency that is attributed not to Man, but to things.

Intellectual property law has been strongly criticised for restricting the fluid and infinitely replicable quality of information judged to be vital to intellectual economies.¹ Political demands for the free flow of information are complemented by theoretical developments in anthropology which emphasise post-modern realities such as globalisation, transnational flows, and creolisation in the invention of tradition. It has been strongly argued that culture can no longer be perceived as a

¹ R. Coombe, 'The Properties of Culture and the Possession of Identity: Postcolonial Struggle and the Legal Imagination' in Bruce Ziff and Pratima V. Rao (eds.) *Borrowed Power: Essays on Cultural Appropriation* (Rutgers University Press, New Brunswick, 1997), pp. 74–96; D. Posey and G. Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (International Development Research Centre, Ottawa, 1996); C. Golvan, "‘Aboriginal Art and Copyright’: The Case of Johnny Bulun' (1989) 10 *European Intellectual Property Review* 36.

bounded, static entity, but only as a dynamic, constantly re-negotiated process.²

How best to protect culture from being copyrighted in the face of this flow of cultural imagery will remain an issue for as long as we adhere to an assumption that has vitally influenced the way we handle the carriers of this imagery. This assumption, made explicit in the philosophy of Emile Durkheim and prevalent in anthropology, maintains that concepts, formed in the mind, are transferred to solid material objects which can come to stand for memories, and which, by virtue of their longevity, preserve or prolong them indefinitely beyond their purely mental existence. To those who adopt what Whitney Davis (1986) characterised as the 'projectionist fallacy', the social life of things appears to be generated by multiple projections of concepts which diverge as things are moved from context to context.³ The surface of things, their 'look', and the knowledge surrounding the details of their construction, appeared not to matter, as long as they were explained by a content that could be re-written over and over again.⁴

A short summary of the main tenets of intellectual property law may suffice to show how such an assumption is also present in legal formulations.⁵ Western intellectual property law seeks to encourage innovation, by protecting the rights of individuals and corporations to make profit from the ideas they produce. Graphic designers thus work in an environment shaped by international property laws that commodify, protect, license, and regulate the use of the imagery upon which they draw. Intellectual property law is thus based upon liberal, individualist principles born of Enlightenment conceptions and legitimated by Romantic ideologies. The Eurocentrism of these premises often devalues creative expressive forms which are produced collectively, intergenerationally, or in unfamiliar media, by those with non-European cultural traditions. As a consequence, although such imagery may be legally

² H. Morphy, 'Aboriginal Art in a Global Context' in D. Miller (ed.) *Worlds Apart* (Berg, Oxford, 1995), pp. 211–40. American Institute of Graphic Arts, 'Who Owns Cultural Images: The Property Issue' (1995) 14(1) *Journal of Graphic Design*.

³ A. Appadurai, *The Social Life of Things* (University of California Press, Berkeley, 1996); W. Davis, 'The Origin of Image-Making' (1986) 27 *Current Anthropology* 193.

⁴ D. Summers, 'Form: Nineteenth Century Metaphysics and the Problem of Art Historical Description' (1989) 15 *Critical Inquiry* 372.

⁵ A text that negotiates anthropology and law is M. Brown, 'Can Culture be Copyrighted?' (1998) 39(2) *Current Anthropology* 193.

available for use, unauthorised usage may offend the sensibilities and norms of the peoples concerned.

Laws of copyright protect the creative products of individual authors, pictured as autonomous individuals whose creations are the products of the originality of an unfettered imagination. The law assumes that 'ideas' are always available for appropriation, but 'expressions' are the property of those who inscribe or imprint them. Through their work, authors make these ideas their own, their possession and control over their work being thus justified by this expressive activity.

There is an obvious, and frequently made, difference between our own legally recognised forms of intellectual property and those found across much of the world. In the Pacific, for example, Simon Harrison has pointed out that for Trobriand or New Ireland economies, the circulation of goods creates social relationships between the transactors.⁶ In societies in the Pacific, we see ideas being created and circulated in a gift, rather than a commodity mode, creating relations that form the foundation of a culture's political economy. Rights in magic, in dances, in rituals, or in the designs of masks or statuary are therefore treated as intellectual prestige goods, and form part of the special status or ceremonial spheres of exchange. What matters to Pacific Islanders is not the object or the expression of an idea, which is essential to Euro-American concepts of copyright, but rather the idea behind it.⁷ What is copyrighted, one might say, is the technology, the knowing 'how' to translate the idea, encompassed in relational and mnemonic imagery, into material form. Therefore, the 'look' of a thing does not reflect concepts and relations already in existence, but visualises how attachments are created. In fact, as Marilyn Strathern has pointed out, the notion of copyright is misleading in relation to such things, for people 'own' them most securely as memories still to be realised.⁸

We have assumed, as Simon Harrison recently pointed out, that ideas, and identities constructed in relation to ideas, are abundant.⁹ In

⁶ S. Harrison, 'Intellectual Property and Ritual Culture' (1992) 21(2) *Man* 435; M. Strathern, 'The Patent and the Malanggan' in C. Pinney and N. Thomas (eds.) *Beyond Aesthetics: Art and the Technologies of Enchantment* (Berg, Oxford, 2001), pp. 259–87.

⁷ S. Küchler, 'Sacrificial Economy and its Objects: Rethinking Colonial Collecting' (1997) 2(1) *Journal of Material Culture* 629; Harrison 'Intellectual Property and Ritual Culture', at p. 234; Strathern, 'The Patent and the Malanggan', at p. 271.

⁸ Ibid. at p. 273.

⁹ S. Harrison, 'Identity as a Scarce Resource' (1999) 7(3) *Social Anthropology* 239.

line with the framing of a textual-visual culture, we have lost sight of an alternative model of identity, often expressed in cultures around the world. This model assumes attachment to be a scarce, rather than an abundant, resource, and a response to the look of a thing rather than the desire of a person. In this model, the making of identity goes hand in hand with the various re-creations of imagery which surface in things.

The apparent 'otherness' of this model has become strangely familiar. In an uncanny permutation of pre-modern notions, it now seems that, as intelligence is designed into everyday products, there is no such thing as inanimate matter. We are witnessing an avalanche of new sensing, networking, and automating technologies, which are created with the sole purpose of bringing 'dead' objects to life by making them responsive to human needs and emotions. As it becomes more plausible to imagine the agency of things, we are faced with an increasingly pressing need to re-think the way we form attachments.

RE-THINKING ATTACHMENT

The re-thinking of attachment has been spear-headed by writers with a keen interest in science. This is because the evidential paradigm which the humanities are beginning to assimilate into theory and methodology is not raw and unformed, but has already been defined by disciplines such as genetics and biology, as well as architecture and computing. Science now confronts us with a new type of evidence, which is sought in images of living organisms whose complexity can also be discerned in the materiality of things, be it 'techno-textiles' or computer viruses. Known as 'non-linearity', this new paradigm has changed our models of memory and identity. No longer are these understood as the passive trace of attitudes, beliefs, and memories formed in culture. Instead they evidence organisms' capacities to construct themselves. Evidence is thus based on logic and connectivity, rather than on the rational systems of differentiation and text-based systems of classification. From Neil Denari's architecture of the continuous surface¹⁰ to artificial life-forms created in Californian laboratories, non-linearity and its implications for capturing reproductive and generative resources which leave their trace in material form are guiding increasingly mainstream projects.

¹⁰ N. Denari, *Interrupted Projections: Another Global Surface or Territorial Re-codings on the World Sheet* (Atsushi Sato, Japan, 1996).

Cellular systems and systems of cultural form may still appear unconnected and thus of no consequence for those concerned primarily with the latter. This indifference is vanishing, as visualisation techniques in computing bridge the gap between mathematics and art, and between neurological and philosophical explorations of mind. 3D-modelling and the creation of virtual life-forms are made possible by what computer science calls the 'manifold'. By identifying the generative element inherent in form, it is possible to elicit transformations which are increasingly spontaneous and self-governing, and which permit the creation of computer-generated viral forms or animated computer-imagery. The recognition that form is generated by the connectivity of images rather than a pre-existent symbolic system of rules and meanings, has become of paramount importance in neuroscience, which has found evidence that neuronal nets register decisions before they are conceived by consciousness.

Outside science, textile design was the first domain to absorb the new vision of materials that behave like organisms, and which manifest a 'second nature' comprised of rule-ordered human constructions, while at the same time mirroring the given, pristine nature of physical and biotic processes, laws, and forms. Known as 'techno-textiles', artificial fibres that aspire to all the qualities of texture and permeability displayed by natural fibre, but with an added quota of 'agency' reflecting communicative codes, have been reaching the market.¹¹ Textiles are now able to act as communicative surfaces, they are regenerative and will soon be self-cleaning. No longer do these surfaces appear as trivial and fleeting expressions of a seriousness that resides elsewhere.

The new artificial life model that inspires the production of techno-textiles distils an out-of-body experience, in as much as it no longer needs bodies because tailoring has been turned into a problem of fibre, not figure. Similar artificial life models are present in the field of reproduction, in which the connections of sex/gender to social relations have become an abstract affair, while drawing on images that reflect on culture. Helmreich, in his work on the cultivation of artificial life in the digital age, poignantly describes these artificial worlds as 'gravity wells' that bring together odd pairings of science and culture in the making of a 'looking-glass world', in which second natures are rich sources not just for re-theorizing biological life but also for researcher's reflections

¹¹ B. Quinn, *Techno Fashion* (Berg, Oxford, 2002).

on their own lives.¹² Helmreich's subject is 'Silicon Second Nature', a substance and space that artificial life researchers seek to create in computers. He depicts a world in which artificial life researchers embrace the logic of synthetic vitality and come to possess a new sort of subjectivity, a silicon second nature that may be increasingly common among humans inhabiting a world in which computers are haunted by 'life'.

This work raises, but does not answer the question of how attachment might be re-thought in intellectual economies. What sorts of expectations might fashion things which were capable of recalling absent images in ways that were both generative and reproductive? What would persons have to become before they could recognise themselves in 'shifting ephemera on the surface of life'?¹³

One of the reflections on attachment that is beginning to provide us with some answers to these questions is entailed in the work of the art historian and specialist of the eighteenth century, Barbara Stafford. In her most recent book, entitled *Visual Analogy* (1999), Stafford argues that we need to re-visualise how we create attachments in terms of connections and resemblances. For what we take as expressions of ideas in fact promote a conscious search for often hidden connections recognised by tracing the resemblances between things. Attachments are the unintended outcome of such a search whose seriousness lies within, not outside the imagistic quality of things. As a connector, the look of a thing is analogous not to language, but to thought and consciousness, emulating Alfred Gell's (1998) allusion to the abductive quality and cognitive 'stickiness' of things. The call to re-visualise the way we create attachments brings into question assumptions inherited from the Enlightenment, which evoke dis-analogy, distinction, and contradiction as the basis of our understanding of essentially classificatory relations. We live, as Stafford illuminates, surrounded by the legacy of dis-analogy and distinction when we shop and move about our daily business, faced with 'the homogeneous aloofness of cult initiates and gated communities addressing only themselves within a mosaic in which arguing groups exclusively seek to promote their separate interests'.¹⁴

¹² S. Helmreich, *Silicon Second Nature: Cultivating Artificial Life in the Digital World* (University of California Press, Berkeley, 1998).

¹³ A. Hollander, *Seeing Through Clothes* (Routledge, London, 1993 (1st edn 1973)), p. xv.

¹⁴ B. M. Stafford, *Visual Analogy Consciousness as the Art of Connecting* (MIT Press, Cambridge, MA, 1999), p. 10.

As a scholar of the visual-textual culture of the Enlightenment, Barbara Stafford draws our attention to post-modern writings that treat the social and material metaphors of distinction as though they were attracted to the beauty of a phenomenon that was on the verge of disappearing. It is precisely the ending of distinction and dis-analogy that is signalled by this adoration of the cornerstones of Enlightenment thought and by the consequential annihilation of connection and resemblance. Stafford's reflections on contemporary Western visual culture recognise the possibility of an alternative interpretation based on an analogy drawn with the pre-Enlightenment concern with animate things. For, then as now, knowledge and proprietary rights are invested not in objects but in image-based resources, access to which depends on the capacity to recognise and anticipate resemblances that present themselves most succinctly in visual form.

Melanesia, where intellectual economies are well documented, is the natural context in which to explore whether such a model might identify solutions to old problems with persons and property. We recall the importance of the image as already relational in kind, a world of ideas to which complex proprietary rights are attached. It is in relation to this image-based economy of knowledge that treasured possessions have been examined by Melanesian ethnography, and yet, the look of such things has somehow remained peripheral to the discussion of how these objects come to be the *loci* of ideas about possession. The look or surface of things appeared as nothing more than the remains of a domestic, usually feminine, touch, serving to embed things into place, but remained largely inconsequential to the concern with understanding the unfolding of relations between persons and property forms. Detailed studies of art-like things are found alongside equally detailed studies of relations that dwell in the space of culture, yet the two are rarely brought into conversation with each other. The work of Alfred Gell, and especially his *Art and Agency*,¹⁵ has opened new perspectives on the question of how social relations might be found in the nexus of art objects.

Gell's *Art and Agency* develops an eclectic combination of theories of personhood and cognition, and shows that something quite new, yet also familiar and central to anthropological theory, emerges in the wake of this quasi-magical act of synthesis: a theory of objectification which is not about meaning and communication, but about doing, not

¹⁵ A. Gell, *Art and Agency: An Anthropological Theory* (Oxford University Press, Oxford, 1998).

about persons, but about material entities which motivate inferences, responses, or interpretations. The proposition advanced in the initial chapters of *Art and Agency* is strangely simple. It evolves from a re-reading of Maussian exchange theory in the light of Marilyn Strathern's (1986) theory of the fractality of personhood, according to which social relations obtain not between persons, but between persons and things, because persons can be substituted by things.¹⁶ Replacing the Maussian theory of prestation by 'art objects', Gell sought to fashion, out of a prototypical, and exemplary anthropological theory, an anthropological theory of art. This theory, moreover, set out to offer a theoretical definition of art in terms of things provoking attachment, in contradistinction to given institutional, aesthetic, or semiotic definitions. We find here a real alternative to existing theories of art, which shifts the study of social relations in anthropology from the observation of behaviour to material culture.

This anthropological theory of art merges with the social anthropology of persons and their bodies, allowing for the possibility that anything could conceivably be an art object, including living persons. The argument is that the nature of the art objects is a function of the social-relational matrix in which they are embedded, such that they have no 'intrinsic' nature independent of their relational context. In this re-thinking of the relational matrix in terms of the art nexus and the logic of the index, Gell's treatise breaks with the conventional contextual, institutional, or semiotic analysis of art. In the art nexus, agency is mediated by indexes, that is, material entities that motivate inferences, responses, or interpretations. Indexes may stand in a variety of relations to prototypes, artists, and recipients. Artists are not just causally responsible for the existence and characteristics of indexes, but may be the vehicles of the agency of others. In this definition we find Gell embracing fully Strathern's Melanesianist deconstruction and notion of the partible and distributed person. Actions and their effects are thus not discrete expressions of individual will, but rather the outcome of mediated practices in which agents and patients are implicated in complex ways. On the one hand, the agency of the artist is rarely self-sufficient; on the other, the index is not simply a product or end-point of action, but rather the distributed extension of an agent.

¹⁶ M. Strathern, *The Gender of the Gift: Problems with Women and Problems with Society in Melanesia*, Studies in Melanesian Anthropology, 6 (University of California Press, Berkeley, 1986).

The notion of a world of things whose look or surface-sheen impels attachment was presented in Gell's *Art and Agency* as the dynamic which underlies processes of objectification. We may dismiss the visibility of surface as the last phase of capitalism in which its consumption mirrors the alienation from relations of production, its beauty heightened as it too disappears from view. But this observation may lead us to lose sight of the *use* to which the play with surface is put.

PERSONS AND PROPERTY FORMS IN THE PACIFIC

The subversive, empowering, connecting, and humorous or ironic nature of visual analogy is the subject of much of contemporary Pacific art, like the work of Annie O'Neil whose crocheted flowers have become synonymous with the Pacific Sisters, an association of women artists from across the Pacific. Working mainly out of Auckland, but equally at home in London, New York, and Los Angeles, Pacific Sisters run weekly market stalls, community events, shows, and galleries. Their pan-Pacific dynamic and global impact is driven entirely by the allure of the image which connects the local and the idiosyncratic with the global by the re-surfacing of things and of people with patterns. T-shirts are the most visible traces of this image-economy. Everybody has them, everybody wants them: they are impelling in a manner which seems to express the notion of 'cognitive stickiness', if only because they are so hard to get rid of once they have been seen. Covered in glossy prints, they provoke recognition of a simultaneously localised and yet infinitely transportable imagery, by combining a common and public image with a local and often intimate joke.

One need not have been born and bred in a particular area of the Pacific, or even within the Pacific at all, in order to be attracted to Annie's flowers or to the bright T-shirts sold in the markets. The flowers overtly conjure up associations with the domestic, with labour and relations of love and sacrifice, exported from Victorian England and turned into the nostalgic image of the South Pacific. Annie's flowers, however, are not a window onto another world. The flowers *are* this world and subvert it by visualising the connecting power of the global image, re-connecting the distinctions that globalisation has brought in its wake. Annie's most recent creation are crocheted cords that visualise the way attachment is created through acts of binding. For anthropologists these images are unsettling, because these inherently translatable

surfaces call into question ethnography itself, especially its drive to demarcate distinct places and persons, and the profundity of its quasi-embodied knowledge, which is thought to be the only means of revealing the economic and political consequences of the way persons create attachments.

Having pointed to the imaginative and subversive use to which the re-surfacing of things is put, I want now to turn to the nature of the surface peculiar yet not restricted to the Pacific. That is, I want to ask what difference the appearance of a thing makes for the way attachments are forged between persons and things. To its detriment, anthropology followed the conventional art historical analysis of style in assuming that what a thing looks like must be in some way related to the 'context' of its production and circulation. That is, until Alfred Gell pointed up another possibility by arguing that what a thing looks like evokes a complex set of transformations that are both logical and intentional in kind. In fact, we can go a step further and see that the transformations that are etched into the surfaces of things are sometimes discovered to bear a likeness with the processes from which persons emerge, allowing these things to be substitutes for persons and to shed light on what property is or can be. The importance of this alternative perspective on things was driven home to me, when, after more than a decade of working on the figural artworks of *malanggan*, I started to work on the thread and the stitch of quilts.¹⁷ This might seem to be a totally different context: how could one expect to be able to compare property forms and persons in Melanesia and Polynesia? They look very different, but are the concepts of person and property they capture really that different? Elsewhere I have argued for the importance of binding in the Pacific in creating topologies of being and thinking which broadly fall into two types, involving a linear versus a planar conception of the spatial qualities of surface.¹⁸ As knowledge technologies, the linear versus the planar conception of patterned surface wrought through binding, is associated with two quite distinct ways of thinking about connectivity and resemblance, throwing up quite different expectations about what a person is or is likely to be.

These two ways of visualising, I want to argue, have to do with the topology of surface, the application of force, and the generation

¹⁷ S. Küchler, *Malanggan: Art, Memory, and Sacrifice* (Berg, Oxford, 2002).

¹⁸ S. Küchler, 'Binding in the Pacific: The Case of *Malanggan*' (1999) 69(3) *Oceania* 145.

of form. The first assumes an exterior force moulding a surface as it envelops it, creating a form which evokes what exists only as absence, as negative space embracing the object. A good example of this are Malanggan sculptures of New Ireland in Papua New Guinea, as were ancient Roman figurines made out of clay. Interestingly, these Roman figurines were used to legalise relations over land; this parallels the way Malanggan sculptures are used to create or re-write relations over land. Both were broken into two or more pieces, depending on the number of persons acquiring a share in usufructuary rights. The missing surface literally recollects a shared container. In New Ireland it thus makes perfect sense to lump all kinds of different possessions together, whether they be trees or cars, and treat them in the same manner as being governed by acts of sharing skin. Persons are related if they share in the consumption of surfaces, not the other way around, leaving relations over property fluid as well as manifold. In New Ireland, a person can have rights to land, cars, trees, and shops in a potentially infinite number of places, connecting with others like a spider's web that is constantly re-woven. The cutting or severing of surfaces, followed by the tying of a knot, matter enormously in describing the moment at which things attach themselves to persons. From this perspective, persons appear as blank sheets, filled with whatever attachments can be fabricated during life. Yet, on the other hand, there is a deep significance to the learning of images, because persons take into themselves something that they already held within them as potential. One is reminded of Janet Coleman's (1992) exposition on Plato's theory of memory in which she argues that, for Plato, nothing new of importance was ever learnt during life (cf. Bloch (1998)).¹⁹ Learning is merely recalling what one already knew, but had forgotten, and is guided by what in Islamic theory is called 'mnemonic domination' using rote remembering as a technique of learning.

The second way of visualising a shared likeness assumes an interior force moulding a surface as it escapes, creating a linear trace of a hidden, interior source. Good examples of this way of thinking about surface as linear trace are German limewood sculptures of the fourteenth

¹⁹ J. Coleman, *Ancient and Medieval Memories: Studies in the Reconstruction of the Past* (Cambridge University Press, Cambridge, 1992); M. Bloch, 'Internal and External Memory: Different Ways of Being in History' in his *How We think They Think: Anthropological Approaches to Cognition, Memory and Literacy* (Westview, Boulder, 1998), pp. 67–85.

and fifteenth century and Yupno knotted cords.²⁰ German Limewood sculptures were carved from the inside, hollowed out in order to remove the inner core. It was the unique texture of the wood which allowed for the sculpting of the surface, revealing the drapery of a dress, the creases of the skin, the lines of age and laughter, allowing for an inner life to come to the surface, outlining the character believed to be unique to the persons depicted. Limewood sculptures were produced in the hundred years leading up to the Reformation in Germany, commissioned by newly-established merchants who had come to aspire to the standing once accorded to the guilds. We see here an Aristotelian notion of personhood expressed in visual form that recognises the cumulative appropriation of knowledge throughout life as crucial to the making of persons. The property forms associated with this concept of the person are history. In the Pacific, the Yupno knotted cord forms a little-known, rather unassuming, and somewhat perplexing object, apparently used to recall ancestral place names, the trouble being that there is no independently verifiable way of unravelling the relation between knots and names. Compare this to the well-known example of the Andean Quipu, a knotted cord used by messengers to transport intricate information across a vast, centralised state, where different types of knots, in different colours, and with different spacing, encoded quantitative information relating to property in all its detail.²¹ The point of the Yupno cord is by contrast, that you are never sure what you should know or what others might know. As you run it through your fingers, you anticipate connections and trace links that make up life in forever new and surprising ways.

Ironically, although the Yupno cord appears to be quite strange to us, it is in fact much closer to the concepts that we bring to objects. The notion of surface as interior and linear space has a familiar ring and it may thus not come as a surprise that net-bag dresses, which were manufactured for a recent Milan fashion show, scored a fabulous success. By contrast, the idea of surface as continuous, planar, and exterior space is familiar to us only from 'strange' contemporary architecture, like that

²⁰ J. Wassman, *The Song to the Flying Ox: the Public and Esoteric Knowledge of the Important Men of Kandingei about Totemic Song, and Knotted Cords* (Cultural Studies Division, National Research Institute Publication Middle Sepik, 1996); M. Baxandall, *Limewood Sculpture in Renaissance Germany* (Yale University Press, Yale, 1980).

²¹ M. Ascher, *Code of the Quipu: A Study in Media, Mathematics and Culture* (Michigan University Press, Ann Arbor, 1981).

of Neil Denari whose buildings unfold like a continuous ribbon, connecting while enfolding in a cumulative manner.

Topology, the study of the way surfaces behave, has not received much attention in anthropology. This is not surprising, given anthropology's general acceptance of a conception of space in which spatial relations are ego-centred, anthropomorphic, and relative. The study of topology becomes interesting only when one leaves behind a mechanical theory of cause and effect and replaces it with a so-called organic one, where the behaviour of the surface of things reflects on the self-organising capacity of relational complexes. From this perspective, the conception of surface as either interior or exterior, linear or planar, suggests a performative dynamic of connectivity and resemblance.

The best example is the quilts of the Cook islands known as '*tivaevae*.' '*Tivaevae*' could be described as a perfect example of Annette Weiner's inalienable possessions.²² They are made for bride-wealth exchanges, for first hair-cutting, and they are wrapped around and piled on top of the dead who are buried in or adjacent to the house; quilts, therefore, pave the paths of tribes. The proud possession of every woman, *tivaevae* are stored in large wooden trunks. Large, rectangular and elaborately patterned, *tivaevae* resemble bedspreads, yet are only used as such once a year for village competitions organised by the many women associations that traverse the islands. These women's associations have begun to wield formidable political and economic power over the last 10 years, with their representatives running the non-governmental organisation and members controlling bank-accounts that put chiefly land-holding families to shame.

Despite the fact that most women who avidly spend most of their free time stitching *tivaevae* will readily admit that they really do not like *tivaevae*, the quilts are silently realised as *the* thing that equals the most desirable possession of all – a ticket to one of the many far off places in which Cook Islanders live.

More than three-quarters of Cooks' population live somewhere else, and being able to move back and forth for marriages, funerals, and first hair-cutting ceremonies is one of the most desirable and prestigious aspects of modern life. It is quite common to meet women who travelled to Australia and New Zealand within the span of a few months, attending a hair-cutting here, or simply visiting a daughter there. Indeed it is part of the work of a women's association to travel, including extended

²² A. Weiner, *Inalienable Possessions* (University of California Press, Berkeley, 1992).

visits of groups of women to neighbouring islands within the Cook Islands, but also to places further afield, such as Sydney or Los Angeles. Most of the flowers depicted on the quilts are at home someplace else, as are most of the designs embroidered into pillow-cases and the like.

The look of *tivaevae* in the Cook Islands shares many similarities with quilts made in Hawaii and in Tahiti. This common visual concern with thread and stitching resonates with the concerns of the London Missionary Society. The Society trusted in the educational virtues of embroidery and sewing to internalise an appropriate attitude to work, time, and the management of personal possessions, an attitude which would be publicly manifested as domesticity. However, it is also the case that the availability of cotton, as a result of the spread of Chinese trading across this part of the Pacific, facilitated a development of surface and thus of new forms of property in ways suggested, yet hampered within the existing polity of images around which tribes ranked themselves. We know from collections that the Cooks produced *to'o* like images known also from Tahiti that were unwrapped and re-wrapped in layers of barkcloth and sennit at the highpoint of a ceremony that expelled and reconnected the dead with the living. Cook island *to'o* were wrapped in barkcloth that was laboriously coloured in red, yellow, and black as well as covered in fine, hand-drawn lines, which appeared to have been replaced by striped cotton cloth during the nineteenth century.

This sheds light on the peculiar visual quality of the Cook Island *tivaevae*, its multiple layering held together by the stitched lines of thread visible as a continuous line on the underside of a quilt. The theme of flowers takes on another importance when one realises that in the *to'o* like images, flowers made of knotted sennit cord served as holders of red feathers, a much-valued possession reflecting networks of trade and influence. Suddenly it is no longer strange to think of *tivaevae* as connecting devices, facilitating movement and mapping exchange relations, rather than facilitating home-grown wealth creation.

Yet what about the layering? There are, as it were, between two and five layers, which like in an onion can be taken away without infringing the design. The outer and most visible layers outlining the design are the most common and are shared within the extended tribe, while only the first and last added layer, the stitched embroidery, distinguishes one woman's work from another, while connecting those within a household. Each of the layers can exist independently of the other, thus

allowing conceptually for the layering of co-existing forms of property that ultimately are encompassed by and anchored in the household.

In closing, let us return to the apparently insurmountable difference between the carved Malanggan image and the stitched *tivaevae*. Their distinctive surfaces allow us to reflect on the way attachments are created – the soft and easily perforated surface of the Malanggan which visualises connections that exist already as potential, and the layered surface of the *tivaevae* which visualises the co-existence of distinct connections radiating outward from a centre. Visually and conceptually, both are things that throw light on the intrinsic relation, of logic and performance, between the materiality of surface and a concept of person. This relation was shown to be one of visual translation, of seeking resemblances and connections in ways that motivate the acquisition of new materials and technologies of knowledge. The question of how to re-visualise the way we form attachments has thus profound implications for how law and anthropology will approach innovation in an era of intellectual economy in which seriousness resides in the shifting ephemera on the surface of life.

CHAPTER NINE

OUR ORIGINAL INHERITANCE

Alain Pottage

In May 2000, two parliamentary members of the Council of Europe, Jean-François Mattei and Wolfgang Wodarg, organised an Internet petition which invited concerned individuals to protest against the implementation of the European Union's 1998 Directive on the Legal Protection of Biotechnological Inventions. This was the Directive which, according to its critics, effectively authorised the patenting of 'human' gene sequences. Signatories were asked to write to Romano Prodi, then the President of the European Union, affirming the proposition that 'the human genome is the common patrimony of humanity', and requesting that 'the granting of patents on the genome be suspended'.¹ By the time it was submitted, in November 2000, the petition had apparently attracted some 10,000 signatures, mainly from France. It included the names of prominent geneticists such as the Nobel laureates Jean Dausset and François Jacob. President Chirac also expressed his adherence to the petition, but his support was somewhat equivocal, being based less on the recognition of the special prestige of life or biology than on the pragmatic argument that the patents system might be stifled: '*trop de brevets tuent le brevet*'.²

¹ The full text of the petition is at www.respublica.fr/sos.humangenome/index1.htm

² *Libération*, 12 February 2001. 'Equivocal' hardly suffices to describe the policy of the Socialist government towards the Directive. Having actively supported the draft Directive in Brussels, government ministers repudiated it as an offence to human dignity when the time came to implement it in French law (see Antoine Schoen, 'La mauvaise foi française' (2002) 358 *La Recherche* 110).

The theme of genetic inheritance now infuses so many dimensions of life, from the personal experience of health to the functioning of social institutions such as employment and insurance, that it has become essential to many contemporary forms of self-understanding. It has also become an established element in the legal and political discourse of bio-ethics, which embodies it in instruments such as the UNESCO Universal Declaration on the Human Genome and Human Rights of 1997:

The human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity. In a symbolic sense, it is the heritage of humanity.³

As used in the petition, the notion of genetic patrimony or genetic heritage confuses a number of distinct themes and concepts. For example, 'patrimony' is often used to mean something like an unenclosed (genetic) commons, while elsewhere it does much the same work as the distinction between commodities and non-commodities. But in the sense captured by the petition, these different ideas are subordinated to the concept of inheritance⁴ in both of its principal dimensions: that is, *patrimony* as a fund or estate transmitted through generations, and the fiduciary office of the *heir* as the disinterested custodian of this fund. In promoting the petition, Mattei observed that 'humans now think in terms of their children, of the future generations from whom they hold today's world in trust'.⁵ What should one make of this revival of the old themes of inheritance and transmission in the context of the ultra-contemporary fields of genetics and biotechnology?

The phrase '*patrimoine génétique*' should probably be translated as 'genetic heritage', but here the word *patrimoine*/patrimony is retained because it refers back to the French legal tradition which informs the petition. At the same time, however, it should be emphasised that this chapter is not conceived as a study of how the legal concept of patrimony or *patrimoine* might be applied to human genes.⁶ Very little of the

³ Adopted 11 November 1997, text in UNESCO, *Records of the General Conference, 29th Session*, vol. 1 *Resolutions*.

⁴ Or at least inheritance understood as the devolution of an estate through generations.

⁵ See Mattei's Report to the Council of Europe (Doc. 8738, 5 May 2000).

⁶ For a comprehensive analysis of the legal concept of *patrimoine* in French law, and its application to genes, see F. Bellivier and L. Brunet, 'Ressources génétiques et concepts juridiques de patrimoine', in Catherine Labrusse-Riou, *Le droit saisi par la biologie* (LGDJ, Paris, 1996).

doctrinal architecture of the legal concept survives its translation into the diffuse discourses of bio-ethics. Where the legal concept of *patrimoine* is complex, abstract, and contested, the ethical notion of genetic patrimony is just vague. Indeed, the UNESCO Universal Declaration refers to the 'symbolic sense' in which the genome qualifies as heritage or patrimony precisely because those who drafted it wanted to avoid some of the more specific legal connotations of the concept.⁷ Of course, vagueness can be productive, and some strands in bio-ethical discourse mobilise the doctrinal complexity of the concept of *patrimoine* rather opportunistically, to lend an impression of coherence to their disparate arguments for the domestication of biotechnology. The petition and the texts annexed to it play on the most general themes of patrimony, such as inalienability, integrity, trusteeship, and so on, avoiding the difficult doctrinal question of how to translate these general principles into determinate rules. With that in mind, this chapter traces out some of the more general characteristics of the notion of genetic patrimony, focusing on the way that it trades on a popular, untheorised, analogy between legal inheritance and the transmission of genes. This analogy is interesting precisely because it lifts the 'patrimonial' relation between persons and things out of law and transposes it into biology, articulating a novel kind of bio-political relation.

LIFE AND LAW

In one sense, it is obvious why the theme of inheritance should appeal to political critiques of biotechnology. Understood as 'patrimony', or as a partnership across generations, the legal framework of inheritance belonged to a world that was still comparatively simple. It pertained to a society with an ordered geometry, in which the local was just an assignable part of the global; a society of which material scarcity was a basic premise, and which could be mapped by clear divisions between nature and culture, or between persons and things. Inheritance made sense in societies which imagined that it was possible to conserve this form of geometry through time. It was assumed that the past could be repeated into the future in such a way as to integrate change into tradition. In short, inheritance connotes a kind of social order and a mode of social action that is predicated upon an order of divisions rather than

⁷ See Antoine Schoen, *Des brevets sur les gènes humains: Analyse d'une controverse d'origine scientifique*, doctoral thesis (Université de Paris Sud, 2002), esp. pp. 138–40.

an economy of contingent distinctions.⁸ But the theme of genetic patrimony emerges at a time when the legal or social institution of inheritance has become quite marginal, precisely because it has become so difficult to stabilise these archetypical divisions. Although the legal institution of inheritance flourished well into the modern period, it has now lost most of its significance. For example, in England even the estates of great aristocratic families are as likely to be governed by the constitution of the National Trust as by some private trust. In place of the commodities over which owners once had dominion, and which once made up patrimonial funds, we now have 'socio-degradable' commodities.⁹ In these circumstances, it is clear that inheritance in its traditional sense is an inappropriate, and, ironically, an expensive, process. Typically, inheritance wealth is now expended *pre-mortem*, to educate children and dependants; that is, to develop adaptive competences rather than to provide an enduring patrimonial asset.¹⁰ Insurance has replaced inheritance as the principal means of securing social expectations.¹¹ From this perspective, the notion of genetic patrimony seems almost reactionary, even though it expresses some fairly generalised misconceptions about the functioning of law in society.¹²

More specifically, the concept of genetic patrimony implies a particular understanding of the relation between law and life. To employ Michel Foucault's classic distinction, it understands law as a 'juridical' rather than a 'bio-political' enterprise. The central point of Foucault's analysis of bio-power is that at a certain point in Western history 'life' is folded into 'society', thereby collapsing the axiomatic division between norm and nature. Whereas the old 'juridical' model of law was based on a set of basic structural asymmetries, which divided norm from nature, ruler from subject, and law from society, in the new bio-political ordering these divisions are 'dis-embedded'. In a bio-political society, these divisions are the emergent effects of the articulation of power rather than the structural preconditions of power relations.¹³ The way in which divisions are eclipsed by distinctions is exemplified by the

⁸ On the question of divisions and distinctions, see generally the Introduction above.

⁹ Anne Gotman, *Héritier* (Presses Universitaires de France, Paris, 2000), p. 75.

¹⁰ See generally Gotman, *Héritier*.

¹¹ See generally Niklas Luhmann, *Risk: A Sociological Theory* (de Gruyter, Berlin, 1993).

¹² Some of these issues are canvassed in my 'The Inscription of Life in Law: Genes, Patents, and Bio-politics' (1998) 61 *Modern Law Review* 740.

¹³ See generally my 'Power as an Art of Contingency: Luhmann, Deleuze, Foucault' (1998) *Economy and Society* 1.

operation of norms. Bio-political norms are deployed within a particular kind of legal or administrative regulation, and, paradigmatically, they are based upon a statistical map of the social field in which they intervene. Statistical maps are shaped by the bureaucratic and actuarial techniques which are used to compile them, and (to use a phrase that recurs throughout this chapter) one might say that the map constitutes the 'territory'. Normative interventions are formulated on the basis of this kind of knowledge, and 'effects' of normative interventions will be observable only as changes in (for example) the statistical schemes upon which these interventions were based. So the impact which the norm has upon the 'outside world' is not directly visible to law or administration. The 'outside world' is experienced only as an opaque environment which constantly challenges the administration into producing better and more finely-adjusted normative programmes.¹⁴ The relation between the two operational elements of a norm – cognition and normative intervention – is such that norms continuously intervene in their own representation of the world. For that reason one might say that the relation between norm and nature is internal to the norm, so that the axis of correspondence (the division between norm and nature) is actually a form of reflexive *self*-relation. By contrast, the concept of 'genetic patrimony' presupposes the old 'juridical' model of correspondence between norm and nature. In his capacity as *rappporteur* for France's 1994 bio-ethics legislation, Jean-François Mattei proposed that the task of the legislation was to fill a legal vacuum (*un vide juridique*).¹⁵ The idea of a legal vacuum makes sense only if one imagines that 'law' can be distinguished from something called 'society', in relation to which it would have a privileged relation of observation and intervention. It is not insignificant that most of the techniques which legal institutions used to represent their correspondence to nature were developed in the context of inheritance strategies.

The distinction between law and nature has a history, which, were it to be written, would tell of the aesthetic or logical forms which law has used to construct nature in its own image and to locate itself on one side of an *a priori* division between norm and nature. For example, in early modern Europe botanical taxonomies were presented in the form

¹⁴ For an extended study of bio-political norms and actuarial knowledge, see François Ewald, *L'Etat providence* (Grasset, Paris, 1986).

¹⁵ See Paul Rabinow, *French DNA: Trouble in Purgatory* (University of Chicago Press, Chicago, 1999), p. 125.

of genealogies, and, in turn, family genealogies were presented in the form of family trees. This peculiar parallel between the legal order of kinship and the natural order of plants served to 'naturalise' the legal order of genealogical descent. The legal inscription of each individual in a sexed line of inheritance, which ascribed paternal and maternal offices and articulated rules and degrees of consanguinity, was made plausible by means of a factitious analogy. First, legal representations were absorbed into the 'natural' order of botanical taxonomies, which were cast in the image of law's own notions of genealogical descent, and then law re-integrated this factitious image as the 'original', or 'natural' order of which it was just the cultural mirror-image.¹⁶ In other words, an institution which was neither natural nor cultural 'authenticated' itself by splicing itself into self and other, culture and nature. The notion of genetic patrimony might be seen as a contemporary version of this kind of involuted analogy. It is clear that the modern scientific understanding of 'heredity' was informed by legal models of inheritance and transmission. Carlos Lopez-Beltràn's history of the concept of heredity opens with an account of how, from the eighteenth century onwards, the dictionary definition of 'heredity' as a legal quality was gradually displaced by biological interpretations of the word.¹⁷ Of course, a semantic displacement does not necessarily evidence a strong conceptual affiliation, but such things as the distinction between what is innate and what is acquired, or the idea of a material substance passed on through generations, bear the imprint of law. This forgotten affinity allows law – in the transposed form of bio-ethics – to see itself reflected in molecular biology. But the strongest affinity centres on the textuality of inheritance. According to the modern orthodoxy, our genetic inheritance is composed and transmitted in linguistic form:

[T]he deciphering of the DNA code has revealed our possession of a language much older than hieroglyphics, a language as old as life itself, a language that is the most living language of all – even if its letters are invisible and its words are buried deep in the cells of our bodies.¹⁸

¹⁶ See Pierre Legendre, *Leçons IV: L'Inestimable objet de la transmission: Etude sur le principe généalogique Occident* (Fayard, Paris, 1985), pp. 217–22.

¹⁷ Carlos Lopez-Beltràn, *Human Heredity, 1750–1870: the Construction of a Domain*, PhD thesis (King's College, London, 1992).

¹⁸ George Beadle, the Nobel Prize winning geneticist, cited in Lily E. Kay, *Who Wrote the Book of Life? A History of the Genetic Code* (Stanford University Press, Stanford, 2000), p. 17.

In biology as in law, heredity is organised textually, so that the potentialities of biological life are stored and unpacked through the juridical manipulation of writing.

The reference to text suggests another, stranger, affinity. It might be said that law is the original biotechnology. According to one kind of legal anthropology,¹⁹ law is the essential and most enduring technique for the fabrication of human life, the traditional means of recruiting biological processes in the service of a social design. In the case of law, the design is institutional rather than commercial or industrial. The traditional role of Western law was to institute subjectivity. A psychic life that conceived of itself as unbounded, and which had no knowledge of death, time, or alterity, was pressed into defined institutional roles which communicated and inscribed each of these existential structures. In that sense, and by means of a particular aesthetic technique, law made life live. This improbable parallel between traditional and modern life technologies is illuminating precisely because it traces a parallel rather than a convergence. The question which at once associates and distinguishes law and biotechnology is the question of how law and life, or the social and the biological, are bound together. In the case of legal technique, the difference between law and life is dissolved into a single institutional compound; biological life is always already institutional. There is no distinction between law and life other than that which is drawn by, and within, the institution. Legal subjectivity is artefactual, not in the limited sense suggested by commonplace distinctions between roles and role players, but in the more radical sense that law invented both the form and its substrate.²⁰ Rather like law, biotechnology also fuses the social and the biological. Donna Haraway's observation that the genomic map is the territory²¹ is one expression of the idea that commercial technology is the condition of existence of life processes or biological essences. In actualising the potential of life itself, biotechnology engenders the life that it exploits. But whereas the productivity of legal institutions depended on the inscription (or *incarnation*) of an order of divisions, biotechnology works with an economy of distinctions, in which definitional boundaries are

¹⁹ On this theme see generally Legendre, *Leçons IV: L'inestimable objet de la transmission*, esp. at p. 353.

²⁰ See especially Yan Thomas, 'Le sujet de droit, la personne et la nature' (1998) 100 *Le Débat* 85.

²¹ Donna Haraway, *Modest Witness@Second Millenium.Femaleman©_Meets_OncoMouseTM* (Routledge, New York, 1997).

deployed as contingent attributes of the world rather than as ontological divides. The legal order of division and attachment gives way to a bio-political economy, in which none of the old co-ordinates seem to hold. According to the popular sense of things, the agency of genes threatens to become radically anti-institutional: genes promise ageless vitality, reversible genealogies, and, eventually, immortality.²² That is the reason why so many of the interventions proposed by legal bioethics revert to the old order of inheritance, and hence to the old institutional co-ordinates of persons and things, culture and nature, past and future.

Implicitly, the representation of the human genome as genetic patrimony reverses the polarity of Foucault's model of bio-power. Rather than acknowledge that the 'inclusion' of life – or the life sciences – in society has radically re-organised the old semantic elements of law, it finds in the mechanical order of genes an occasion to reaffirm the essentially juridical character of law and society. In the petition, the popular understanding of genetic transmission is used to reaffirm the old correspondence between law and nature. In the process, bio-ethical discourse collapses at least a century of social evolution, in the course of which the institution of inheritance has lost its central position in society. Indeed, bio-ethics restores inheritance in its purified form, purged of the complex ruses which were once used to fictionalise persons and things, or heirs and inheritances. Once rehabilitated, the institution of inheritance supplies a normative criterion for the domestication of technology: tradition is (re-)invented for the purposes of critique. But this critical recovery of legal tradition depends upon attaching the old division between persons and things to the biological distinction between genotype and phenotype. And the coupling of legal form to biological process has some unseen consequences. As molecular biology begins to outgrow the old orthodoxy of genotype and phenotype, and begins instead to focus on the functioning of metabolic networks, it becomes increasingly difficult to stabilise the old division. Rather, the way in which the line between person and thing, human and non-human, or nature and culture is drawn is entirely dependent on the perspective from which biological process is observed or 'interrupted'. For so long as 'life' remains a compelling reference in legal and bio-ethical discourse,

²² Reproductive cloning is often presented by both supporters and detractors in terms of a fantasy of immortality.

this kind of indeterminacy might turn out to have some advantages. 'Ethical' solutions can be precipitated from the complex networks to which commercial biotechnology has given rise. But it is interesting to observe the emergence of a particular form of bio-political paradox, in which the affirmation of legal divisions articulates and sustains a mode of social action which is entirely misrepresented by any form of knowledge based upon these divisions. And, precisely because this process of misrepresentation touches on the institution of inheritance, one of the oldest legal institutions, it also sheds some light on the functioning of traditional legal institutions.

GENETIC INHERITANCE

The fact that the UNESCO Universal Declaration describes the human genome as heritage only in 'a symbolic sense' should perhaps caution against any interpretation which lends real discursive force to the notion of 'genetic patrimony'.²³ Mattei and Wodarg's petition was a political initiative, which, one might say, contributed to the rather marginal role of the Council of Europe in promoting human rights and in safeguarding the 'common heritage' of Europe.²⁴ But, as an important player in French politics, Mattei was at least as concerned with domestic debates about the patenting of genes. In the French context the notion of 'genetic patrimony' is as much embedded in legal doctrine as it is in politics or in public discourse. So the concept is interesting precisely because it serves as an index to the way in which legal discourse is inflected by bio-ethical representations of biology. Semantically, the notion of patrimony links legal doctrine and biological science: the outline form of the legal model of transmission is still visible in science's self-presentation, while, on the other side, legal doctrine, particularly in France, imports themes from the life sciences. As a semantic linkage, the notion of genetic patrimony is a complex form, which articulates the scientific distinction between genotype and phenotype, the old normative distinction between an inheritance and its heirs, and an emergent doctrinal distinction between 'humanity' and the human person. To these elements, one might add a particular representation of time:

²³ For a more cautious approach than that which is taken here, see F. Bellivier, 'Le génome entre nature des choses et artéfact' (1998) 7 *Enquête* 55.

²⁴ See chapter 1 of the Statute of the Council of Europe, 5 May 1949.

by reference to the constancy of the genotype, the idea of patrimony cools the complexity of social time by loading normative schemes into biological form.

Juridifying gene action (1)

The idea of genetic patrimony is almost as old as the modern science of genetics, which is why the life sciences – or life itself – now seem to affirm the naturalness of the institution of inheritance. Metaphors of patrimonial transmission were written into early explanations of the transmission of genes (or rather their precursors: pangenes, ideoplasm, or units of heredity, as they were variously known). So it was not uncommon to represent the integrity of the genotype or germplasm in terms of a fund or *patrimonium* that outlived any of its custodians: ‘As far as inheritance is concerned, the body is merely the carrier of the germ-cells, which are held in trust for coming generations’.²⁵ This notion of genetic inheritance divides the individual human being into the two essential dimensions of inheritance: the patrimonial fund (the genome or genotype) and its temporary heir or custodian (the organism or phenotype). But whereas the office of the heir imposed legal or moral obligations, the sciences of genetics have turned these bonds of obligation into simple biological mechanisms. The basic principle of modern genetics, namely, the idea that ‘protein is never a cause of DNA’,²⁶ turns the heir into the simple instrument or effect of his or her inheritance. The bond between the two terms is constituted by the mode of ‘gene action’ by which the molecular alphabet of genes (DNA) constitutes the material body (protein) of the individual organism. The phenotype is absolutely commanded by the genotype. But this is quite different from patrimonial inheritance in its legal sense. First, understood in terms of the central dogma of genetics, the transmission of genetic information is successful to an extent which the old legal technique of inheritance could neither have imagined nor tolerated. Precisely because they are social institutions, legal institutions are thoroughly improbable constructions, and inheritance institutions are no exception. A genetic programme, by contrast, articulates a process of seamless causation, a natural force

²⁵ From E.B. Wilson, *The Cell in Heredity and Development* (1896), quoted in Evelyn Fox Keller, *The Century of the Gene* (Harvard University Press, Harvard, 2000), p. 17.

²⁶ An influential restatement is in Richard Dawkins, *The Extended Phenotype* (Oxford University Press, Oxford, 1982), p. 285, restating a proposition originally made by Crick and Watson in the 1950s.

rather than an institutional effect. And, if the constitution of the person is so absolutely commanded by his or her DNA, then the essential distinction of inheritance dissolves. There is no distinction between the inheritance and its inheritors, no normative command or injunction to inherit and transmit, and nothing resembling the social contingencies that legal regimes of inheritance were designed to meet (unless one makes too much of evolutionary selection). Although this sort of seamless immanence might be represented as the ideal to which inheritance aspired, it was an ideal whose realisation would have implied the end of inheritance. The defining limitation of inheritance was precisely that it could only be a conditional norm rather than a mechanical cause.

The 'mechanisation' of transmission – or of the relation between genotype and phenotype – was an achievement of mid-twentieth century genetics. When Wilhelm Johansen invented the terms 'phenotype' and 'genotype' in 1909, the notion of the 'phenotype' (*Erscheinungstypus*) was conceived as a contribution to the emergent science of population genetics. The phenotype was the statistical mean of a population of individual organisms which, despite being the representatives of a single 'pure line', manifested observable and quantifiable variations. Only later did the term phenotype come to be applied to the observable traits of individuals as such, rather than a population of individuals, so that the relation between genotype and phenotype could be conceived as the expression of the latter by the former.²⁷ Modern genetics characterised the expression of the genotype as the unidirectional process of 'translation' that is described in François Jacob's celebrated restatement of the modern dogma: 'the translation of a sequence of nucleic acids into a sequence [of amino acids] is effected by the intermediary of a code which establishes a correspondence between two alphabets, one composed of nucleic acids and the other of [amino acids]'.²⁸ But whereas 'translation' might suggest risk and creativity,²⁹ in this case it meant only the automatic transcription of one language into another. This explanation was made all the more obvious by the experimental scene of genetics. The living laboratory for many experiments in molecular biology is the nematode worm, *Caenorhabditis elegans*, an organism

²⁷ See André Pichot, *Histoire de la notion de gène* (Flammarion, Paris, 1999), esp. pp. 82–83.

²⁸ François Jacob, 'Le modèle linguistique en biologie' (1974) *Critique* 197, at p. 198.

²⁹ Notably in the work of Bruno Latour; see especially *Pandora's Hope* (Harvard University Press, Cambridge, MA, 1999).

whose body is literally – as well as metaphorically – transparent, and which is therefore apt to be seen as a mere effect of gene action:

Using a laser, you can ablate one cell and be absolutely confident of what cell has been killed and what it would normally give rise to . . . you can look at the complete neural circuit for a particular piece of behaviour and get a complete and convincing description of the nature of that behaviour . . . You can look at it and say 'that is all there is'.³⁰

And these images of biological determinism are readily translated into the popular idea that, for example, the sequencing of the genome will eventually allow individuals to carry their own personal biological design around in their pockets in the form of a CD-ROM. However improbable they might be,³¹ these representations still sustain the fantasy that the development of each particular organism is entirely contained in, and governed by, the genetic programme that is transmitted (and modified) by the process of evolution. This model of gene expression might be far removed from the modes of institutional action which were at work in the old institutions of inheritance, but it is presupposed by arguments for 'genetic patrimony'.

Life and law (1)

To the extent that the modern idea of a genetic programme values the inheritance above its heritors, and presents it as a principle that commands the existence of each temporary custodian, it has affinities with the notion of human dignity as it has developed in French legal doctrine. Recently, French law has evolved a concept of dignity centred not on the human person but on the species as a whole. This shift is evidenced by changing representations of the 'appropriation' of human genes. Formerly, the basic legal and 'ethical' objection to gene patents was that, because gene sequences were parts of the human body, any proprietary power over human DNA necessarily violated the integrity and autonomy of the persons from whom source tissues were taken. To recognise ownership rights over any part of the body would be to open the way to slavery. It is true that arguments for genetic patrimony do not

³⁰ Cited in Richard Doyle, *On Beyond Living: Rhetorical Transformations of the Life Sciences* (Stanford University Press, Stanford, 1997), p. 14. On the value of *C. elegans* as a research tool, cf. Michel Morange, *La part des gènes* (Odile Jacob, Paris, 1998), p. 70: 'When a model based on a simple system is pushed to its limits, that system can be particularly instructive'.

³¹ See Fox Keller, *The Century of the Gene*.

entirely displace this objection. In an interview with *Le Monde*, Mattei explained that all the principal subscribers to the petition were agreed that 'man, including his smallest part, his genes, should not be treated as a commodity'.³² Nevertheless, the notion of genetic patrimony imagines the human body not (simply) as the substrate of an individual, but as a means of access to the 'genetic alphabet' of the species as a whole. Genetic information itself is attributed not to the body of the individual donor but more fundamentally to humanity as a whole; not to the individual organism (phenotype) but to the species (genotype). This implies a different economy of whole and part: whereas genes were once seen as parts of a person's body, and therefore essential to the integrity and autonomy of the person, now bodies are seen as receptacles or instantiations of the species' genome, so that the claims of the person are subordinate to the interests of the species. Individual bodies are just the form in which the species as an enduring entity is exposed to attack or offence, and the rights of the species may well have to be defended against the 'inhabitants' of each individual body. As in the past, informed consent might still be recommended as a way of regulating the taking of those tissues from which sequence information is abstracted,³³ but now the consent of any individual will be qualified so as to secure the integrity of mankind's patrimony. The distinction between individuals and their own species-being is implicit in the question whether any (legal) person should be allowed to become 'the sole proprietor of the components of the human species'.³⁴ As Olivier Cayla and Yan Thomas point out in their discussion of dignity,³⁵ the modern idea of autonomy was premised on the right of each person to possess or govern themselves, but the newer model of dignity turns this

³² *Le Monde*, 26 May 2000, p. 12. This argument assumes that genes are covered by Article 21 of the Council of Europe's Oviedo Declaration on Human Rights and Bio-Medicine (1997): 'The human body and its parts shall not, as such, give rise to financial gain'.

³³ See, e.g., para. 43 of Mattei's Report to the Council of Europe, Doc 8738, 5 May 2000: 'Under no circumstances must man be exploited by man, in whatever form, be it a single gene, cell or tissue. Fundamental rules must be respected, as regards the donor's free, informed consent, the non-payment and anonymity of donation, final cost calculation and consideration of needs worldwide, where solidarity must be practised between solvent and insolvent countries. It is a matter of elementary respect for human dignity'.

³⁴ See the text of Mattei and Wodarg's petition.

³⁵ See Olivier Cayla and Yan Thomas, *Du droit de ne pas naître* (Gallimard, Paris, 2002), esp. pp. 47–50.

axiomatic self-relation into an other-relation, which imports a structure of reciprocal rights and obligations into the form of the individual human being.

Arguing for this novel conception of dignity, Bernard Edelman describes how 'dignity' has been transformed from its old form, in which it was the legal transcription of liberal philosophies of personal autonomy, into a newer usage, in which it is the name given to the 'generic bond' between all human beings. According to Edelman, the 'birth' of this new legal concept has been obscured by the fact that a single word articulates two different concepts.³⁶ The theoretical argument (borrowed from Deleuze) is that legal concepts are characterised not by their propositional content, but by the particular institutional practices which sustain their existence and which constitute their proper mode of 'becoming' (*devenir*). Although the word 'dignity' was well established in French law, it was charged with a new concept by a process of hermeneutic reconstruction which was substantially motivated by anxieties about biotechnology. Whereas the bourgeois liberal interpretation of dignity was based on the universalisation of the self-interested individual – a process exemplified in Kant's maxims for the universalisation of particular interest – the newer sense of dignity is based on the acknowledgement of commonality rather than the magnification of individuality. So, for example, novel legal concepts such the category of crimes against humanity or the category of world heritage (*le patrimoine commun de l'humanité*) are constructed not as the perimeters of individual liberty but as the defences of human life as such. For that reason, they each invoke the generic bond (*lien générique*) which constitutes the simple, ineffable, 'humanity' of human beings.

Whereas in juridical terms the person of human rights discourse represents the universal individual in its universal freedom, thereby staging a process of *identification*, humanity itself cannot be represented in this manner. Rather, it presents itself as the symbolic reunion of all men in the dimension of what they have in common, namely, their quality of being human beings. In other words, it affords the *recognition* that one belongs to a single 'genre', the human genre.³⁷

³⁶ 'En droit, la dignité est un concept nouveau: il vient à peine de naître (Dignity is a concept new to law: it has only just been born)': Bernard Edelman, 'La dignité de la personne humaine, un concept nouveau' in *La personne en danger* (Presses Universitaires de France, Paris, 1999), pp. 505–14, at p. 506.

³⁷ Ibid.

The referent of law is no longer 'man' as a social or political artefact, but 'humanity' as a trans-cultural and trans-historical essence. Edelman, glossing the reasoning of the French courts in the case of Klaus Barbie (where it was held that there were no jurisdictional boundaries and no limitation periods in relation to crimes against humanity), argues that this was so because the space and time in question were the expansive sphere of humanity rather than the parochial terrain of a particular political subject. So, for example, the imprescriptible time of human being cannot be expressed in the local currency of a national state law, but only by a law that has the measure of humanity itself; that is, 'a natural supranational law which expresses the obligations imposed by the universal community of humanity'.³⁸ In effect, legal norms are directly elicited from the fact of biological existence, and genes are the most compelling aspect of that existence. In conceptual terms, the significance of this doctrinal shift is that the universal is supposed to be already and immediately present as a natural fact, materialised as the molecular substance of the human genome.

Inheritance time (1)

As Edelman puts it, the ideal of patrimony suggests a perpetual present in which 'humanity exists between those who are already dead and those who are yet to be born'.³⁹ By regenerating the old understanding of heritage or patrimony as a fund that is received and passed on intact from one generation to the next, Mattei and Wodarg's appeal to genetic patrimony conjures up the kind of temporal horizon that was presupposed by long-range inheritance instruments. Landed estates were designed to be held for several generations, and the legal instruments which governed their transmission sought to fold all supervening events or contingencies into structures defined by the past. The concept of genetic patrimony fashions something like this understanding of temporal succession from the modern understanding of genes. Beginning with the idea that at the level of the genotype time is measured in an almost geological span of replication and mutation, the notion of genetic patrimony removes even these temporal contingencies by playing on the notion of a *fund*. Although nothing in the concept of genetic patrimony denies or overlooks the variability and mutability of the

³⁸ Bernard Edelman, 'Le concept juridique d'humanité' in *La personne en danger* (Presses Universitaires de France, Paris, 1999), pp. 527–50, at p. 534.

³⁹ *Ibid.* at pp. 539–40.

genotype,⁴⁰ the idea that the patrimony of mankind consists in the whole set of *potentialities* contained in the human genome implies that supervening variations are already contained in the genome. According to the legal definition, a fiduciary fund is a nominal entity, which survives despite or through changes in its precise extent or composition. Whatever is in the fund is characterised and delimited by the original obligations of custodianship or trusteeship. Similarly, even if the composition of the genetic fund changes, 'patrimony' is delimited and stabilised by the constancy of its relation to the proprietor-species, and hence by the enduring bond between owner and *res*, or between person and thing.

Seen from the perspective of an evolutionary *longue durée* the distinctions between species seem fluid and contingent, but from the comparatively short-term perspective of bio-ethics, temporal and geographical variations are characterised as changes to the predicates of an enduring species-form.⁴¹ This produces a horizon of inheritance that resembles an *aevum* of mediaeval historiography. That is, it unfolds as a sort of permanent present, a period in which all events occur within the same existential frame or medium; all events have, so to speak, the same essence (the interesting twist being that genes constitute the time of their own transmission). By reconstructing evolutionary time in this way, legal-ethical doctrine finds in nature a warrant for its simplifications of social time. In the *aevum* constituted by genetic patrimony, the world within which norms are formulated now is the same as that which will be inhabited (or borne) by the successive generations that they are designed to protect. Judgments about intergenerational equity can be made without risk of temporal degradation. The effect of this kind of temporal simplification is to deny the social-structural significance of risk and uncertainty. Like the so-called 'precautionary principle', the notion of genetic patrimony fails to recognise the catastrophic nature of risk, or the problem of having to make decisions now without knowing

⁴⁰ UNESCO Declaration on the Human Genome and Human Rights, Article 3: 'The human genome, which by its nature evolves, is subject to mutations. It contains potentialities that are expressed differently according to each individual's natural and social environment, including the individual's state of health, living conditions, nutrition, and education'.

⁴¹ The bio-ethical understanding of evolution is somewhat at odds with that which is proposed in, for e.g., Stephen Jay Gould, *The Structure of Evolutionary Theory* (Harvard University Press, Cambridge, MA, 2002).

how the existing state of affairs will be transformed by the decision we make, this transformation being observable only from the horizon created by the decision rather than the horizon from within which the decision was made.⁴²

INHERITANCE AS INDIVIDUATION

There is a fairly straightforward scientific argument against the notion of genetic patrimony, which relies on statistical variation more than experimental observations of gene action:

There is no such thing as hereditary patrimony. My genome is different from that of my parents and from that of my children. It is quite wrong to speak of 'my patrimony' because that would imply something that is transmitted from one generation to the next, whereas children do not have the same genome as their parents. We inherit some genes from one of our parents and the rest from the other. I inherited 50% of my father's genes and 50% of my mother's, so that my set of genes is different from that of either of my parents, from that of any of my grand-parents, and so on. There is, quite simply, no such thing as patrimony. Neither of the individual, nor, *a fortiori*, of humanity.⁴³

So, whereas legal-ethical argument translates the distinction between phenotype and genotype into a distinction between heir and inheritance, this statistical illustration reminds us that what is inherited by each heir to the 'genetic patrimony' is in fact a unique endowment. The relation of each 'share' to the 'whole' fund is far more complex than what can be accounted for by the notion of patrimony. But, beyond that, the model of gene expression which informs bio-ethical programmes is becoming less and less plausible. For some time, experimental observation has generated insights that are inconsistent with the orthodoxy of linear gene action and its associated metaphors of evolutionary programmes.⁴⁴ These observations suggest that the role of genes should

⁴² For a critique of the precautionary principle, and the argument that the only thing that can be anticipated reliably is catastrophe, see Jean-Pierre Dupuy, *Pour un catastrophisme éclairé* (Seuil, Paris, 2002); and, for the model of risk as a question of observation, see Luhmann, *Risk*.

⁴³ Henri Atlan, in Henri Atlan and Catherine Bousquet, *Questions de vie: Entre savoir et opinion* (Seuil, Paris, 1994), p. 152. This is precisely why the human genome project was designed to produce only a 'consensus' genome.

⁴⁴ See generally Fox Keller, *The Century of the Gene*.

be conceived in terms of a model of cellular epigenesis rather than a paradigm of genetic determinism. Whereas some might see this as a complication of the modern paradigm, on the basis that molecular biology has always placed proteins, or cellular metabolism, at the centre of its explanatory (if not its experimental) focus,⁴⁵ for others these experimental observations are indeed generating a new paradigm.⁴⁶ This paradigm so effectively dissolves the core nexus of (juridical) gene action – the causal bond between DNA and protein – that in place of the dogma that ‘protein is never a cause of DNA’ epigenesis foregrounds the role of intracellular metabolic processes (protein) in stabilising and activating DNA. ‘Genetic patrimony’ would, then, be a strange kind of endowment: an inheritance constituted by its heirs.

Presented as a critical counterpoint to ‘modernist’ orthodoxy, epigenesis transforms the linear model of gene expression. More specifically, it prompts a reconsideration of the conventional two-stage account of expression as the transcription and translation of nucleotide sequences. Transcription is the process in which a bounded DNA sequence (that is, a sequence delimited by start and stop sequences) is converted first into a primary (RNA) transcript, and then into a secondary (mRNA) transcript. In essence, the production of mRNA involves splicing the primary transcript into an effective sequence by removing the introns (the redundant ‘non-coding regions’, or ‘junk DNA’) that are interspersed between the exons (coding regions) which compose the sequence information needed to produce a given protein. The succeeding phase – translation – is that which directly implements the genetic code, because it is at this stage that nucleotide sequences are supposed to command the ordering of amino acids into protein chains. This causal relation as emphasised in the code is strictly one-way: ‘the transfer of information always takes place in a single direction, from nucleic acids to proteins’.⁴⁷ The dogma that the translation of nucleic acids into amino acids is strictly a one-way process implies that the folding of these protein chains into their effective three-dimensional structures is also programmed by the transcribed sequence information. This overall story of transcription and translation, as captured in the slogan ‘one gene, one protein’, is still presupposed by most legal-academic accounts

⁴⁵ Michel Morange, *La part des gènes* (Odile Jacob, Paris, 1998).

⁴⁶ R.C. Strohmman, ‘Epigenesis and Complexity: The Coming Kuhnian Revolution in Biology’ (1997) 15 *Nature Biotechnology* 194.

⁴⁷ Jacob, ‘Le modèle linguistique en biologie’, at p. 200.

of biotechnology. How does the model of epigenesis complicate this story?⁴⁸

First, the process of transcription of DNA sequences is actively selective, and not pre-programmed. A single primary transcript can be spliced into a number of quite different secondary transcripts, each of which yields a different variety of protein. This aptitude for selective reading is attributable either to the role of the promoter sequences which control gene expression (so-called 'regulatory genes'), or, more interestingly for present purposes, to the process of alternative splicing, in which the composition of a particular mRNA sequence is governed by the state of the cell's metabolism and the stage of development of the organism as a whole.⁴⁹ The conventional account of transcription is further complicated by the discovery of so-called 'inside out genes', in which the introns are functional whereas the exons are not. Again, the upshot is that attention shifts from the gene (DNA) to the cell (protein), and thence to (self-)organising processes:

It is from the complex regulatory dynamics of the cell as a whole, and not from the gene itself, that the signal (or signals) determining the specific pattern in which the final transcript is to be formed actually comes.⁵⁰

And, even where the reading of a transcript is acknowledged to be governed by promoter regions, this does not necessarily substantiate the modern fantasy of genes regulating genes. Rather, the authority of the regulatory genes turns out to be conditioned by the metabolism. This is what was suggested by the discovery of 'epimutations', so called because they affect the mechanisms which control the function of nucleotide sequences rather than the very structure of those sequences.⁵¹ The

⁴⁸ The best guide here is Thomas Fogle, 'The Dissolution of Protein Coding Genes in Molecular Biology', in Peter J. Buerton *et al.* (eds.), *The Concept of the Gene in Development and Evolution: Historical and Epistemological Perspectives* (Cambridge University Press, New York, 2000), pp. 3–25.

⁴⁹ 'As many as one third of eukaryotic genes are routinely subjected to such variable readings, where the decision as to how the primary transcript is to be read is itself carefully regulated, depending on the state and type of the cell' (Fox Keller, *The Century of the Gene*, at p. 62).

⁵⁰ Fox Keller, *The Century of the Gene*, at p. 63.

⁵¹ Robin Holliday, 'The Inheritance of Epigenetic Defects' (1987) 238 *Science* 163, at p. 168: 'heritable changes based on DNA modification should be designated *epimutations* to distinguish them from classical mutations, which are changes in the DNA sequence (base substitution, insertion, deletion, or rearrangement)'.

expression of certain genes is affected by the presence of the chemical compound methyl on the promoter regions of the relevant gene. And, because the bond between this methyl compound and the DNA sequence to which it is attached is produced by the action of an enzyme, methylase, the state of methylation is ultimately attributable to the functioning of the cellular programme rather than simple chemical action. Therefore, given that the metabolic state of methylation is heritable, what is transmitted is a state of organisation rather than a simple mechanical configuration:

[A] given pattern of functional genomic activity is maintained in a state of nuclear and cytoplasmic enzymatic activities. This functional state is transmitted as such during cell division of differentiated cells although the DNA structures are always the same in undifferentiated and in all the differentiated cells of the various tissues of an organism.⁵²

These observations are reinforced by similar contingencies at the level of translation, which suggest that 'cellular architecture itself contains an information coding ability that becomes apparent during translation'.⁵³ Not only can one have the selective reading of RNA transcripts, but the resulting proteins themselves are shaped by cellular activity. This is one reason why the business of genomics is now complemented by the emergent science of proteomics.

More immediately, these insights direct attention away from the notion of genetic programmes and towards the means of individuation of organisms. Although all biological life is mechanical in the sense that it cannot be referred to any ultimate cause or origin beyond the chemical or physical forces that it contains, each living organism is something more than an effect of those forces. An organism consists in the mode of individuation by which its mechanical elements are structured into a living being. It is, one might say, its own cause; it has no being or essence, only its ongoing self-production.⁵⁴ Lamarck's understanding

⁵² Henri Atlan, 'Biological Medicine and the Survival of the Person' (1995) 8(1) *Science in Context* 265, at p. 271.

⁵³ Fogle, 'The Dissolution of Protein-Coding Genes in Molecular Biology', at p. 13, and also at p. 12: 'In some cases, the ribosomal assembly skips from one to fifty nucleotides in the RNA, shifting the reading frame before continuing. In other instances, the meaning of the code changes to read, for example, a stop codon, a polypeptide termination signal, in place of an amino acid'.

⁵⁴ 'That living beings have an organisation, of course, is proper not only to them but also to everything we can analyse as a system. What is distinctive about them,

of life as a mode of organisation of matter becomes a model of self-organisation, based on a paradoxical mode in which a self constitutes and individuates itself by recursively folding previous operations into present operations, 'using the results of its own operations as the basis for further operations'.⁵⁵ Individuality is sustained (as 'process' rather than 'essence') as *self-transcendence*. One has, then, the paradox of an 'uncaused' organism:

Living beings are autopoietic systems [in that] their being implies the ongoing participation of all their constitutive elements, such that no single one can be said to be solely responsible for its characteristics as such. That is why, *stricto sensu*, it is wrong to speak of genetic determinism, to say that certain traits are genetically determined, or that a specific trait in an organism is determined by the DNA in its cells. More properly, every trait or character of the organism emerges from an epigenetic process that consists in an ontogenetic structural drift.⁵⁶

This notion of self-production implies that individuals are not indebted to any patrimonial programme for their existence. Rather, the distinction between phenotype and genotype is modulated by the developmental and metabolic processes of the organism. The 'genome' is therefore a resource actualised in the ontogenesis of each organism, so that genetic inheritances are effectively constituted by their heritors. The distinction between genotype and phenotype no longer supports the idea of inheritance or 'patrimony'.

GENETIC INHERITANCE?

The idea of genetic patrimony is a complex discursive construct. The modern, mechanistic, understanding of gene action, according to which

however, is that their organisation is such that their only product is themselves, with no separation between producer and product. The being and doing of an autopoietic unity are inseparable, and this is their specific mode of organisation' (Humberto Maturana and Francisco Varela, *The Tree of Knowledge: The Biological Roots of Human Understanding* (Shambhala, Boston, 1998), p. 49).

⁵⁵ Niklas Luhmann, 'The Cognitive Program of Constructivism and a Reality that Remains Unknown' in W. Krohn *et al.* (eds.), *Selforganisation: Portrait of a Scientific Revolution* (Kluwer, Dordrecht, 1990), p. 72.

⁵⁶ Humberto Maturana and Jorge Mpodozis, *De l'origine des espèces par voie de la dérive naturelle* (Presses Universitaires de Lyon, Lyon, 1999) (French translation of *Origen de las Especies por Medio de la Deriva Natural* (Museo Nacional de Historia Natural, Santiago, 1992)), p. 25.

genotypes transcend the phenotypes in which they are expressed, resonates with the doctrinal principle of French law that *human* dignity trumps *personal* autonomy. This association is then reinforced by the legal-ethical understanding of evolutionary time, which translates the distinction between genotype and phenotype into a distinction between time and event; between, that is, the *aevum* constituted by genetic patrimony and the particular events which occur within this immobile temporal horizon. But the central element of this discursive construct remains the distinction between genotype and phenotype as it was construed by the 'central dogma' of modern genetics. As that dogma dissolves, so it becomes more difficult to (re)locate the social co-ordinates of inheritance in the biological constitution of the human organism. The distinction between person and thing is the most essential of those co-ordinates. Precisely because it suggests a mode of ownership (or rather, as I suggested at the outset, a number of distinguishable forms of ownership) the concept of genetic patrimony divides the world into the two registers of person and thing, or *persona* and *res*. The distinction is problematic, first, because it is drawn within the form of the human being, between the individual person and that part of their body which expresses the universal character of humanity, and, secondly, because genes are simultaneously chemicals (things or commodities) and persons (the living template of each human being). From a strictly doctrinal point of view, these ambiguities are not especially problematic. The category of patrimony or *patrimoine* fictionalised persons and things in accordance with the objectives of particular transactions. For example, in the French legal tradition a *patrimoine* was an abstract, indivisible fund, which was unified by its relation to the person whose legal personality it expressed. Everything that was enveloped in a *patrimoine* qualified as a part of this fund, whether it was formally classified as a person or as a thing.

Perhaps the notion of patrimony or heritage appeals to bio-ethical discourse because some vestige of these doctrinal niceties survives in the general understanding of patrimony. But what is more interesting about the notion of *genetic* patrimony is the way that it transplants the old doctrinal category from law into biology. By means of this process of transposition or translation, the distinction which structured the fictions of patrimony – namely, the distinction between *persona* and *res* – is attached to the biological distinction between genotype and phenotype. The semantic potential of the category is no longer shaped by

the particular articulation of legal technique and social expectations which structured inheritance institutions, but is instead elicited by the encounter between legal forms and biological processes. Once transplanted, the concept of patrimony articulates a radically new form of coupling between law and biology, in which the divisions which ordered practical legal logic are animated by an emergent dynamic. Bio-ethics still has the illusion that genes reaffirm the old model of correspondence between norm and nature, but as the orthodox model of gene expression dissolves this assumption becomes increasingly untenable. What happens when the notion of genetic patrimony has to accommodate new experimental information about the genomic continuity between species? At that point, the divisions which bio-ethical discourse attempts to fix through the concept of genetic patrimony disappear into the flux of biological process, so that the various configurations of ownership and access which are used to represent the sanctity of genetic patrimony are staked on distinctions rather than divisions. This gives rise to the bio-political paradox in which artefactual distinctions between *persona* and *res*, or technique and nature, are mistakenly understood as natural divisions.

Juridifying gene action (2)

The legal-ethical description of the human genome as 'genetic patrimony' characterises it as a natural resource that should be preserved and transmitted intact to future generations. Inheritance is understood as being antithetical to commodification, so that in effect the genome becomes what Roman law called a *res extra commercium*, or a thing (*res*) which was withheld from commercial exchange. The underlying assumption is that the genome is a resource that exists independently of the techniques which are used to visualise it and to map its contours. But the practice of biotechnology complicates this simple distinction between knowledge and nature, or between observation and intervention. Whereas the orthodox representation of gene action operationally affirms the idea of science as objective observation, in the case of biotechnology the distinction between observation and intervention becomes more difficult to sustain. To begin with, biotechnology consists not so much in the technological manipulation of life processes as in the recruitment of life processes themselves as technological instruments:

The central tools of recombinant DNA work – such as restriction, transcription, replication and ligation enzymes, plasmids, and other vectors, as well as bits and pieces of DNA and RNA – are not sophisticated analytical and electronic machinery. They are themselves macromolecules. With gene technology, the central ‘technical’ devices of molecular biological intervention have themselves become parts and indeed constituents of the metabolic activities with which, at the same time, they interfere. The scissors and needles by which the genes get tailored and spliced are enzymes. The carriers by which they get transported into the cells are nucleic acid macromolecules. This kit of purified enzymes and molecules constitutes a ‘soft’ technology that life itself has been evolving over a period of some billion years.⁵⁷

Therefore, one might say that biotechnological inventiveness splices life into life, dividing life itself into the two asymmetric registers of technique and object. Which side of the distinction corresponds to ‘real’ life; that is, life as the force or substance that is exploited or enclosed by biotechnology? Are the capacities of life simply abstracted and appropriated by the processes of technology, or is biotechnology life’s realisation of its own capacities? Again, one might say that the map is the territory, but only on condition that one read the connective ‘is’ disjunctively; the point is that the biotechnological or bio-informatic map is distinct but indistinguishable from the territory. Life itself is *neither* the map *nor* the territory, but emerges between the two terms, always outstripping and reconstituting the two. Life is vitality, but not in the sense of (biological) vitalism, since it is not a nutritive or creative principle. Rather, it is an emergent force, and its vitality is generated by the creative distinction between technique and object.

Hans-Jörg Rheinberger observes that ‘from now on it is no longer the extracellular representation of intracellular processes – i.e. the “understanding” of life – that matters, but rather the intracellular representation of an extracellular project – i.e. the deliberate “rewriting” of life’. The distinction between intracellular and extracellular dimensions is not just another variation on the distinction between ‘life’ and ‘technology’, but a formula that expresses the complexity of what is involved in staging a model of life within life itself. Although biotechnology may be technology rather than science, and although it deals with more limited causal chains than biology, it nevertheless operates by inventing ‘extracellular’ models that mimic life itself, *simulacra* which are implanted in

⁵⁷ Hans-Jörg Rheinberger, ‘Beyond Nature and Culture: A Note on Medicine in the Age of Molecular Biology’ (1995) 8(1) *Science in Context* 249, at p. 252.

the 'intracellular' medium, in life itself, and in life processes. The use of bio-informatics as the basic technology for the identification of gene functions means that 'life' is now written by computer programmes, in the form of algorithms that are conceived both as transcripts of gene action and as 'artificial' models. The object is to disclose the pattern of the genetic regulatory networks in which sequence information is expressed by evolving computer models of the possible relays of genetic circuitry. Significantly, and somewhat ironically, a set of techniques that was initially elaborated under the rubric of artificial life, as an attempt to import (natural) evolutionary complexity into the world of computer processing, is now used to develop algorithms that are (re-)applied to life in the form of practical hypotheses about how evolution has shaped the pathways of gene expression or protein formation.⁵⁸ These algorithmic scripts are simultaneously nature (intracellular) and culture (extracellular). They are not mere simulations of life because the algorithmic copy or *simulacrum* creates its model, so that these artificially designed pathways actualise what life itself already is, virtually or potentially. The actual precedes the potentialities that it actualises. In a very particular sense, a bio-informatic algorithm is a *simulacrum*⁵⁹ of life itself. Thus, the distinction between 'intracellular' and 'extracellular' exemplifies the technique of 'perplication' – 'creative distanciation in the midst of things'⁶⁰ – in that it is, precisely, a generative distinction rather than a constituted division.

Mattei and Wodarg's petition warns against 'the confiscation of genetic knowledge' (*la confiscation du savoir génétique*).⁶¹ But just what is 'genetic knowledge'?; a scientific knowledge *about* genes or a natural knowledge archived *in* genes? How can one separate the two registers contained in the unity of a *simulacrum*? The representation of 'genetic knowledge' as 'patrimony' locates the distinction between nature and technique temporally. That is, it draws a distinction between the natural, embedded, potential of genes, and the biotechnological applications through which this innate potential might eventually be

⁵⁸ See generally Minoru Kanehisa, *Post-genome Informatics* (Oxford University Press, New York, 2000).

⁵⁹ 'A simulacrum is not an imperfect copy (*une copie dégradée*), it contains a positive power that negates both original and copy, both model and reproduction' (Gilles Deleuze, *Logique du sens* (Minuit, Paris, 1969), p. 302).

⁶⁰ John Rajchman, *Constructions* (MIT Press, Cambridge, MA, 1998), pp. 18–19, paraphrasing Deleuze's concept of 'perplication'.

⁶¹ See the text of Mattei and Wodarg's petition.

actualised. Here, the notion of patrimony comes to resemble quite closely the concept of a *res extra commercium*, or a good which should not be commodified:

Since [genes] are universal property, it seems unacceptable that anyone should have exclusive rights to them, especially since the confiscation of knowledge is a form of confiscation of the future.⁶²

This is a somewhat limited conception of appropriation or 'confiscation'. Now, bio-informatics treats genes less as molecules than as units of information,⁶³ and the information (i.e. proteins) which genes encode will remain indeterminate for so long as the mechanisms of protein folding are not fully understood. So, although it may be true that biotechnology corporations seek to 'confiscate the future', that proposition has to be understood in a quite specific sense. Increasingly, patents seek to appropriate research paths rather than determinate chemical compounds. Reach-through licence agreements and other royalty-stacking devices are designed to appropriate (at some point in the future) the value that genetic information will turn out *to have had* in the light of future research. In what sense can this be seen as a confiscation of natural patrimony? Presumably, the authors of the petition would define genetic patrimony in much the same terms as the Convention on Biological Diversity's definition of genetic resources as 'organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or *potential* use or value for humanity'.⁶⁴ In these terms, bio-informatics research merely releases natural, existing, potentialities, and the purpose of regulation is to conserve these potentialities for future generations. Developing the idea of life as a *simulacrum*, one

⁶² Council of Europe, Report of Committee on Science and Technology, *Biotechnologies* (Doc. 8738, 5 May 2000), para. 20. See also the report of the CCNE on the proposed implementation of the Biotechnological Inventions Directive into French law: 'Understanding of the human genome is so closely related to the nature of human beings, and so fundamentally necessary to their future well-being, that it cannot be appropriation. It should remain available to the community of researchers, and available to humanity as a whole' (Comité consultatif nationale d'éthique pour les sciences de la vie et de la santé, Avis sur l'avant-projet de loi portant transposition, dans le code de la propriété intellectuelle de la directive 98/44/CE du Parlement européen et du Conseil, en date du 6 juillet 1998, relative à la protection juridique des inventions biotechnologiques, No. 64, 8 June 2000).

⁶³ See Rebecca S. Eisenberg, 'Re-examining the Role of Patents in Appropriating the Value of DNA Sequences' (2000) 49 *Emory Law Journal* 783.

⁶⁴ Convention on Biological Diversity (1992), Article 2 (emphasis added).

might say instead that the supposedly natural potentialities of genetic knowledge are constituted by research applications, and that there is no difference between what is natural (i.e. already there) and what is produced by invention (i.e. what is made of nature). If that is so, the project of conserving genetic resources is paradoxical because conservation necessarily implies intervention. The project of conservation implies not the protection of an embedded division between knowledge and nature, but the (self-)regulation of the social techniques which elicit natural potential. In other words, far from being a pre-existing or pre-social domain, the 'nature' that legal-ethical programmes seek to conserve is an invention of law or bio-ethics. It is constituted by drawing a distinction *within* the hybrid process of biotechnological invention. Law is one of the media through which biotechnological societies represent themselves to themselves, and in which (to borrow Bruno Latour's term) the hybrid process of invention is purified into the juridical registers of nature and technique.

Life and law (2)

As is explained by Bernard Edelman, the doctrinal principle of human dignity entails an unnoticed paradox. On the one hand 'dignity' attaches the structure of human (legal) personhood to the distinction between genotype and phenotype, the better to preserve the distinction between nature and artifice. In that sense it expresses the idea, which is common in French legal doctrine, that the rise of biotechnology has over-inflated legal and social subjectivity. The argument is that the consumers of health services, especially in the area of assisted reproduction, now assume that they have a right to re-design nature according to their own specifications. One of the 'ethical' objectives of law is to stand against this trend by conserving 'the basic anthropological structures of our system of kinship'.⁶⁵ Of course, this assumes a distinction between the brute fact of biology and the social institution of kinship: 'although biological nature is not of itself normative, human nature bears within it a normative principle'.⁶⁶ However, these valorisations of life make the social and biological indistinguishable, collapsing the very distinction that they seek to protect against the corrosive force of technology. Despite themselves, arguments for dignity affirm Giorgio Agamben's argument that the contemporary mode of bio-power is characterised by

⁶⁵ See Catherine Labrusse-Riou, 'La parenté en miettes', *Le Monde*, 10 June 1987.

⁶⁶ *Ibid.*

a hermeneutic technique in which the political and social composition of the human person (*bios*) are founded in the simple fact of biological existence (*zoe*).⁶⁷ In that sense, again, one might say that conservation effectively invents the tradition that it conserves: conservation implies creative intervention.

The point can be illustrated by reference to debates about eugenics, which were an important influence in the formation of the concept of genetic patrimony as it is understood in Mattei and Wodarg's petition. Mattei's presentation of genetic patrimony as a demand for inter-generational responsibility – 'We need common rules in order to live together because we are responsible not only for ourselves but also for others and for the future'⁶⁸ – is entirely vacuous, but noteworthy precisely because it imagines an ethical patrimonial office that is discharged by acknowledging, conserving, and transmitting an inheritance intact. Initially, this idea of conserving genetic integrity was constructed in bio-ethical discussions of eugenics. According to the particular conception which informed the petition,⁶⁹ the practice of eugenics consists in the attempt to improve the species by eliminating individuals who bear some integral but undesirable elements of humanity's genetic fund. In French legal doctrine, the prohibition of various forms of eugenics is presented as a defence of genetic integrity. However, the distinction between integrity and intervention is complicated by the fact that legislation permits the elimination of gametes, embryos, or foetuses which are 'abnormal' in the sense that they carry a latent 'serious and incurable' disease. Ostensibly, this practice is not eugenicist because the important decision is taken by the prospective parents, and because the criterion of normality ensures that the practice is limited to the eradication of nature's own errors. Moreover, it is argued that the strategy is not to eliminate or incapacitate particular individuals so as to restore the vital equilibrium of natural selection, but rather to act directly on the genotype of those who are yet to be born so as to ensure the faithful transcription of a genetic programme:

⁶⁷ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press, Stanford, 1998).

⁶⁸ Explanatory memorandum, Council of Europe Report, *Biotechnologies*, para. 6.

⁶⁹ And which Mattei, as the *rapporteur* for the French bio-ethics legislation of 1994, was instrumental in developing. According to the legislation, 'All violations of the integrity of the human species are prohibited (*Nul ne peut porter atteinte à l'intégrité de l'espèce humaine*)', (*Code civil, article 16-4*, Law No. 94-653 of 29 July 1994 relating to respect for the human body).

Unlike traditional eugenics, contemporary bio-politics is not concerned with the person who transmits a genetic inheritance but with the inheritance itself. This affords an individualized and direct control over the genome of each individual who has yet to be born. The administration does not steer the transformation of the population indirectly, by targeting progenitors; rather, it seeks to attribute to each individual a body that conforms to its own biological ideals.⁷⁰

This ambition presupposes a particular kind of technological development. Both traditional eugenics and contemporary bio-political programmes intervene in the name of nature, but they imply quite different relations between law and life.

Old-style eugenics worked with phenotypes, seeking to restore the principle of unfettered natural selection by eliminating those individuals bearing traits which would not have fitted them for survival and reproduction 'in nature'. It used the principles of artificial selection (breeding) to simulate the effects of unfettered natural selection. This sort of programme presupposed a division between concept and referent, or between the phenotype and the genotype it expressed. The genotype could be addressed only at a distance, by tracing the transmission of phenotypic traits. By contrast, biotechnological interventions rewrite the evolutionary text directly, rather than trying to reproduce the method of natural evolution.⁷¹ We may not yet be at the point where undesired genetic traits can be corrected by direct intervention *in utero* or *in vivo*, but this model of intervention is the governing paradigm of contemporary biotechnology. Hans-Jörg Rheinberger suggests that 'what is new about molecular biological writing is that we have now gained access to the texture – and hence the calculation, instruction, and legislation – of the human individual's organic existence – that is, to a script that until now it has been the privilege of evolution to write, rewrite and alter'.⁷² Biotechnological interventions collapse the essential distinction between genotype and phenotype, upon which the processes of natural and artificial selection were predicated. Instead, they 'edit' or 're-write' the genetic script directly. There are two essential ideas here. First, unlike the technique of artificial selection, the process of biotechnological instruction or 'editing' does not depend upon

⁷⁰ Marcela Iacub, 'L'eugénisme et la protection de l'espèce humaine dans les lois bioéthiques: Vers une nouvelle construction juridique de l'homme' (1999) *Revue de synthèse* 601, esp. at p. 614.

⁷¹ On this, see Rheinberger, 'Beyond Nature and Culture', at pp. 249–63.

⁷² See *ibid.* at p. 252.

being able to recruit and steer the 'natural' force of evolution, or to make incremental modifications to the evolutionary design of genetic scripts. Rather, the entire script becomes a set of unmotivated elements, which can be distributed and combined (across species if need be) in such a way as to fulfil social or technological demands or objectives. The genotype is no longer a fund of fixed potentialities, which have to be actualised by mimicking nature. Rather, each 're-writing' of the evolutionary script imparts a new set of potentialities to the script in which it intervenes. Bio-political norms are coupled to this process of technological editing so that, like biotechnology itself, they work *within* the medium of life itself. Again, one might say that the boundary between norm and nature – and, by implication, the boundary between heir and inheritance – becomes a *simulacrum*.

Inheritance time (2)

The notion of genetic patrimony simplifies social time by removing all risk and contingency from the role of the heir or custodian. It assumes the 'official' version of legal inheritance, according to which the duty of the heir is discharged by passing a patrimonial fund from one custodian to the next. This presupposes the orderly succession of temporal points, so that the present moment occupied by the current heir is simply an accretion to the past and a moment which will constitute the absent past of some future present. Transmission assumes the existence of precisely the kind of continuous temporal horizon that legal-ethical programmes attribute to the evolutionary constitution of the genotype. But the practical, ethical, situation of inheritance exposes the implausibility of this simplification. First, the imperative contained in an inheritance is always excessive – virtual and multiple – so that it must be constituted or actualised by its interpretation and execution:

An inheritance can never be gathered into a unity, it is never self-identical. Such unity as it is presumed to have, if indeed that is the case, can consist only in the injunction to reaffirm by means of a choice (*l'injonction de réaffirmer en choisissant*). 'One must' means that one must filter, sift, criticise, one must sort between a number of the potentialities that inhabit a single injunction.⁷³

⁷³ Jacques Derrida, *Spectres de Marx* (Galilée, Paris, 1993), p. 40.

In other words, the command or injunction entailed by an inheritance has to be actualised by each executor; interpretation is a constitutive act. Moreover, the duty of the heir is two-fold. Given that ethical responsibility of the sort acknowledged by genetic patrimony is a responsibility to those who are not yet present, not yet alive, the heir or custodian has to address the claims of the future as much as those of the past. Mattei's rather banal observation that 'humans now think in terms of their children, of the future generations from whom they hold today's world in trust'⁷⁴ becomes interesting only if one notices that the present generation can only hold their inheritance on trust 'from' future generations if these future beings are taken as the founders (or, in legal terms, the settlors) of the trust. Figuratively, each custodian of a patrimonial inheritance is caught between two commands, one of which is a call from the future (namely, the imperative to make provision for future generations), and the other a demand from the past that the custodian transmit the fund down the line of succession.

The conjunction of these two imperatives collapses the simple, linear, model of inheritance time. Past and future collapse into each other because both past and future imperatives are apprehended by reference to an origin: 'even if the provenance of [the question] lies in the future, it must, like any provenance, be absolutely and irreversibly past; . . . that which lies before it must also precede it as its origin'.⁷⁵ So in the 'ethical' duty of the heir one finds the temporal complexity that characterises the social-structural problem of risk and contingency. In order to determine what decisions one should make as the custodian of future interests, one has to anticipate what the present will turn out to have been from the (future) perspective or point which will itself be constituted by the decision one eventually makes. The present moment is haunted by an awareness that decisions and interventions made in the present will constitute the future in ways that will take on a very different aspect from the perspective of that contingent future. Again, this exemplifies the point that the difference between past and future is not inscribed in the world, but is made by the decision of the present heir or trustee. As a result, the present moment becomes overloaded with a multiplicity of 'virtual' temporalities. All of time is 'virtually' contained in the present. This is precisely the kind of overload which

⁷⁴ See Mattei's Council of Europe Report, *Biotechnologies*.

⁷⁵ Derrida, *Spectres de Marx*, at p. 40 (order of sentences reversed).

makes inheritance less suited than insurance to the securing of social expectations.

As time becomes 'dis-embedded' in these ways, one begins to see (once again) the paradoxes which structure the making of legal institutions. And, as it happens, the institution of inheritance or transmission is perhaps the oldest illustration of the paradox of emergence. The Athenian myth of autochthony – according to which each citizen originated in an ancestor born of the soil of the city – is the primordial example of a legal institution that generated its own founding origin. Nicole Loraux observes that the myth of autochthony was constituted in the present, by means of a technique that was always poised in the middle, between origin and end:

In a remarkable displacement, the end tells the story of the beginning; the continuous occupation of Athenian soil, permanence of the same within the same, enhances autochthonous origin even while helping to prove it. [C]ontinuity of transmission proves legitimacy of possession.⁷⁶

This primordial myth of institutional origin, in which the force of autochthony was constituted only by its continued iteration, illustrates how legal origins were constituted and sustained by their present dramatisation and reception. Although the time of transmission was an institutional time, and although that time was ostensibly inscribed in historical duration, in fact the institution generated the historical duration to which it referred.

Transposing the question from Athens to Rome, the Roman law institution of political origin is distinguishable from the Greek myth of autochthony in that the 'origin' assigned to a Roman citizen was not an actual geographical location but an abstract structural locus. The city of origin was not the place where the citizen was actually born, but an attribute that was transmitted from fathers to sons, even though none of their immediate ancestors were born there.⁷⁷ Plainly the birth

⁷⁶ Nicole Loraux, *Born of the Earth: Myth and Politics in Athens* (Cornell University Press, Ithaca, 2000).

⁷⁷ 'An *origo* was apprehended only in terms of effective function, in the course of a genealogy in which the city was not so much the first cause of transmission as the object of transmission. The "city of which one was born" was that which was transmitted by fathers, although they may well have received it as an inheritance from ancestors who were not necessarily born there' (Yan Thomas, '*Origine*' et '*commune patrie*': *Etude de droit public romain* (89 av. J.-C – 212 ap. J.-C.) (Ecole Française de Rome, Rome, 1996), p. 65).

of some remote ancestor would have been inscribed in the city of origin, but because practical genealogical reckoning went back only three generations, the question of origin was focused not on some real geographical place but on a serviceable institutional reference point. Thus, the ancestral city was constituted as a personal origin by the legal technique through which it was transmitted and inherited, and that technique was not conceived as the legal representation of an original genealogical bond to the soil. Rather, because political origin was identified and deployed as a structural *locus*, the question through which it was apprehended was not ‘*ubi?*’ but ‘*unde?*’ This mode of detachment emphasises – rather more strongly than Athenian autochthony – that inheritance and transmission were founded in a mode of institutional temporality which was contingent and emergent. It was sustained autogenously, by reference to itself, rather than by reference to an order of historical or anthropological fact. Of course, this structure of self-reference has a history, and founding paradoxes are configured differently in different historical periods, but in the present context the contingency of the institution is becoming increasingly difficult to hide. But the interesting point is that in the past, what law’s subjects inherited were not discrete objects or funds, but the very institution of inheritance. Fundamentally, what was transmitted with each succession was the mode of transmission itself. The performance constituted the role, and hence the institution. It is a tribute to the success of law as a life technology that what ran in the blood, or what ran *as* blood, was a particular kind of legal imperative, retroactively constituted by its implementation.

ALL TOO HUMAN?

The paradoxes of ‘genetic patrimony’ are sharply exposed by the question whether the human genome is really ‘human’. If one assumes that species-identity is contained in a particular genotype, and that this genotypical identity is what constitutes the heritage of the species, the answer ought to be straightforward. But the science of genomics has complicated things by challenging the assumption that the human genome is necessarily ‘human’. When the map of the genome was published, one unexpected discovery was that it contained ‘only’ five times as much sequence information as that of a bacterium, and that it was likely to contain only 20 per cent more information than the genome of a minor vertebrate:

Here is a real surprise: the human genome probably contains between 25,000 and 40,000 genes, only about twice the number needed to make a fruitfly, worm or plant.⁷⁸

The genus of the human being, the very premise upon which the concept of genetic patrimony is predicated, dissolves into an undifferentiated continuum of gene sequences. Which elements of this generalised genome are specifically human?⁷⁹ The focus shifts away from the genotype as the material form of an inheritance to the developmental and metabolic processes which stabilise, combine, and actualise the different elements of the genome. A genus is constituted by the cellular or ontogenetic processes which select and organise genomic data, so that the role of the heritor does indeed become more central than the force of the inheritance.⁸⁰ This makes the popular image of the blueprint of the human being as a set of DNA sequences which could be loaded onto a CD-ROM seem even less plausible. More specifically, it turns

⁷⁸ Gerald M. Rubin, 'Comparing Species' in (2001) 409(15) 820 *Nature*. Some of the more interesting questions are canvassed in Jean-Michel Claverie, 'What If There are Only 30,000 Human Genes?' (2001) 291 *Science* 1255, where it is noted that, if only 10 per cent of human genes were commercially exploitable, the ambitions of biotechnology might be somewhat imperilled: 'With only 3,000 candidate genes to work from, i.e., 30 for each of the top 100 companies throughout the world, the pharmaceutical industry is now facing a new challenge. If [high-throughput approaches] are used, developing leads for all of these candidates should only take a few years of fierce competition. In this context (and if patents on genes are destined to hold), one can seriously question the long-term sustainable growth and economic viability of the whole industry, as well as the future of a pharmaceutical R&D strategy consisting of developing new leads for the same targets over and over again'.

⁷⁹ One attempt to address the question is Michel Morange, *La part des gènes* (Odile Jacob, Paris, 1998). A critic of the petition, pointing out that 99 per cent of 'human' genes were shared with chimpanzees, asked precisely what counted as a human gene, and alleged that Mattei's Internet petition was premised on the sort of 'reductive fallacies that are characteristic of contemporary gene fetishism (*Cet appel est, hélas, fondé sur un fallacieux réductionnisme bien contemporain du tout génétique et du fétichisme du gène*)' (Jean-Pierre Berlan, Directeur de recherches at INRA, the French agricultural research body, writing in *Le Monde*, 27 June 2000). Berlan's point was that the real objection to the patenting of 'human' genes is not ethical but political: 'the issue in relation to [the Directive] is not "the patentability of biotechnological inventions", but the granting of a privilege to a handful of multinationals'.

⁸⁰ It is not clear that the idea of the species-specific genotype can be rescued as the model of a developmental programme, since the paradigmatic shift to ontogenesis and cellular metabolism implies a focus on the existence of a particular organism rather than on some general phylogenetic blueprint.

the premise of genetic identity into an explanatory hypothesis rather than a natural fact.

In a memorandum prepared for the Parliamentary Assembly of the Council of Europe, and then in the texts prepared for his domestic audience, Jean-François Mattei acknowledges this problem, and proposes that what is essential is the distinction between biology and technology:

The question of the patentability of genes gives new force to the debate on where the frontier between human and non-human lies, since human and non-human gene sequences may be so similar as to engender confusion. Is a human gene fundamentally different from a non-human gene? Should the rules for material of human origin differ fundamentally from those for other material, or should they be the same for all living matter?⁸¹

The status of genes is ambiguous to the extent that they can be considered not only as elements of the programme that constitutes the physical form of living beings (here it should be remembered that the genetic code is universal, and that the same DNA molecule expresses living beings in general, with the result that at the genomic level it is difficult to distinguish between human and non-human), but also as simple chemical molecules available for (commercial, biotechnological) synthesis.⁸²

Although their meaning is somewhat obscure, these ideas unwittingly echo the old conception of the human being as the only animal that can *identify* itself. Commenting on Linnaeus' classification of man as *homo sapiens* (for Linnaeus, *sapiens* was a convenient cipher for *nosce te ipsum*), Giorgio Agamben observes that 'man is the animal which has to recognise itself as human in order to be such',⁸³ which in turn means that man has also to recognise himself as resembling the animal (notably, the ape) which he transcends through this process of recognition. In that sense, *homo sapiens* is 'neither a substance nor a clearly defined species: rather, it is a machine or artifice which produces the recognition of humanness'.⁸⁴ Implicitly, Mattei and Wodarg imagine the 'nature' of the human in similar terms, as something which consists in the capacity to transcend the natural order. Humans are distinctive

⁸¹ Council of Europe Report, *Biotechnologies*, para. 24.

⁸² Mattei, *Brevétabilité du vivant: danger ou progrès? Le débat français* (available with the text of the petition).

⁸³ Giorgio Agamben, *L'ouvert: De l'homme et de l'animal* (Rivages, Paris, 2002), p. 44.

⁸⁴ *Ibid.* at p. 46.

because although they are 'of nature, they also have the unique capacity to produce culture and technology 'out of' nature. The exceptional location of the 'human' as the hinge on which hangs the division between nature and technology brings with it a special 'patrimonial' responsibility. The capacity to transcend nature gives rise to the duty of holding the two dimensions apart. Specifically, genes should not be allowed to be treated as 'simple chemical molecules'. But the role accorded to human 'nature' is just another pointer to the fact that we are now well beyond any simple division between technology and nature. If genes are potentially *either* the building blocks of life *or* simple chemical compounds, then they are inherently *neither* one *nor* the other. What they are depends upon how they are actualised, and if the way they turn out depends on human self-identification, then it is clear that 'ethics' constitutes the order which it claims only to recognise and protect.

Performatively, the concept of (human) genetic patrimony is not a device that simply maps a particular item of inheritance on to the distinction between nature and culture; rather, it is a device that is designed to (re-)generate that old distinction. Taken at face value, the concept of genetic patrimony implies that the institution or category of inheritance is still in existence and still viable, and more especially that the old co-ordinates of the institution (quite simply, nature and culture) are still recognisable and still embedded in (or *as*) the world. Performatively, however, the pretensions of the concept are much greater than this. The object is to take a particular item (the genome) and deploy it in such a way as to call forth the very co-ordinates that would allow it to be treated as an inheritance. Therefore, the effect would not be to subsume a particular item within an existent institution of inheritance, but to conjure the institution into being (once again) around a particularly prestigious item. So, although the point of this ethical reconstruction of the person is emphatically to keep 'artifice' out of the social,⁸⁵ the fact is that the 'nature' that is counter-posed to 'artifice' is itself profoundly artefactual. The inherent dignity of nature is invoked so as to justify the representation of the human being as something ineffable and

⁸⁵ See the observations of Bernard Edelman: 'What follows when artifice invades social space, if not the supposition that man himself is an artifice and that his values are artificial?' (Bernard Edelman, 'D'un projet l'autre: France et République fédérale d'Allemagne' in *La personne en danger* (Presses Universitaires de France, Paris, 1999), pp. 458–481, at p. 481). Mattei's distinction between 'life' and 'chemistry' is just a restatement of the distinction between 'discovery' and 'invention', which deploys the same sense of 'artifice'.

mysterious, and hence as the bearer of a vital principle that is not a mere resource for technological manipulation. The genetic programme – as vital principle rather than molecular substance – is posed as the definitional limit of any legitimate technology, and hence as the ultimate line of defence of the old conception of the person. But this redeployment of the old division is effectively just an attempt to reconstitute the elements of the original biotechnology from components machined by its successor. A distinction is passed off as a division; biotechnological artefactuality is reconstituted as dogmatic fact.

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